

1 **UNITED STATES DISTRICT COURT**  
2 **FOR THE DISTRICT OF NEW JERSEY**

3 PETER PATAKI,

4 **CIVIL ACTION NUMBER:**

5 Plaintiff,

16-cv-1109-CPO

v.

6 **TRIAL**

7 WALMART, et al.

8 **VOLUME 4**

9 Defendant.

10 **(PAGES 475 - 639)**

11 Mitchell H. Cohen Building & U.S. Courthouse

12 4th & Cooper Streets

13 Camden, New Jersey 08101

14 Friday, November 15, 2024

15 Commencing at 9:45

16 **B E F O R E:**

17 **THE HONORABLE CHRISTINE P. O'HEARN,**  
18 **UNITED STATES DISTRICT JUDGE AND JURY**

19 **A P P E A R A N C E S:**

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33 **ALSO PRESENT:**

34 Ferdinand Martinez, Walmart Representative

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38 Proceedings recorded by mechanical stenography; transcript  
39 produced by computer-aided transcription.

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1 (PROCEEDINGS held in open court before The Honorable  
2 Christine P. O'Hearn, United States District Judge, at 9:45  
3 a.m.)

4 THE COURTROOM DEPUTY: All rise.

5 THE COURT: Please be seated.

6 Counsel, thank you for coming in a little later. I  
7 know I was planning to have you in a little earlier. I had to  
8 handle an order to show cause so I just finished that.

9 I did, however, work, and I know Ms. Dominguez emailed  
10 to you last night, after I reviewed, the final verdict sheet  
11 which I understand we need to take the line off for future  
12 medical. Is there anything else on the verdict sheet that  
13 needs to be changed or is everyone in agreement?

14 Mr. Jean?

15 MR. JEAN: We are in agreement.

16 THE COURT: Mr. McDonnell?

17 MR. McDONNELL: Yes, Your Honor.

18 THE COURT: So Ms. Minix will make that final change  
19 and we will have that ready to go.

20 With respect to the jury instructions, I ruled -- I  
21 don't want to say I ruled by email, but in the email you  
22 received I made a finding after I left yesterday and we did  
23 some research. I am not giving the aggravation charge. The  
24 case law that I cited in that email specifically cited two  
25 cases, New Jersey state cases, that set forth that the

1 plaintiff has the burden to establish that there was a  
2 pre-existing injury and it can't be done through  
3 cross-examination simply by a defendant when the defense is  
4 just that it was a pre-existing. That's not the case here.  
5 The facts don't fit it. I'm not giving it. I think both of  
6 those cases support that.

7 When I went through it, it was very repetitive and  
8 actually, I drafted those, here's the changes I made before she  
9 sent it to you, and my goal was to condense it somewhat and to  
10 not have it be redundant or confusing in light of some of the  
11 charges that I agreed to give. So I don't know how you want to  
12 address it.

13 Have you two conferred about them? Do you have any  
14 objections to anything that's in there? I guess let's start  
15 with Mr. Jean.

16 MR. JEAN: Your Honor, I find it acceptable. We can  
17 work around any issue.

18 THE COURT: Okay. Mr. McDonnell, do you have any  
19 objections to the charge as I have it?

20 MR. McDONNELL: Your Honor, I always want to preserve  
21 the record, so I am just preserving the objections for the  
22 charges that we requested which the Court accepted. Other than  
23 that, Your Honor, we have no objection to the charge that is  
24 written, except, Your Honor, I wonder whether or not life  
25 expectancy can be charged here because Dr. Vizzone didn't

1 testify that he was going to have these problems permanently or  
2 for the future. So there is that kind of question, you know,  
3 which is, he testified, I haven't seen him in two years and  
4 that's kind of it. So, typically, you would have the doctors  
5 say have you formed an opinion to a reasonable degree of  
6 medical certainty whether or not he's disabled or whether or  
7 not these conditions are going to continue for the future  
8 and/or there was some evidence of a prognosis that was offered,  
9 he is going to need surgery or he is going to have pain. There  
10 just wasn't any medical evidence. So my concern -- I am not  
11 going to belabor this, Your Honor. I just want to preserve the  
12 record.

13 THE COURT: I understand. He did say it was permanent  
14 and I think that that gives the plaintiff -- although I will  
15 say, one thing I was thinking about last night, I didn't hear  
16 anybody testify that he needed it.

17 Where is the plaintiff, by the way?

18 MR. JEAN: Your Honor, I don't have any communication.  
19 I don't know.

20 THE COURT: Okay.

21 MR. JEAN: I can't tell you.

22 THE COURT: I didn't recall hearing even that anybody  
23 said he needed to use a cane nor did I hear anybody say he was  
24 prescribed it, just simply, I think, that he walked into the  
25 doctor's office. So I think there's enough evidence on both

1 sides, quite frankly, that you can argue because he said they  
2 were permanent, you can argue he told you he still has pain  
3 today, ten years later. I think that the medical testimony to  
4 support that is pretty thin but barebones is enough by saying  
5 that they are permanent. And certainly, Mr. McDonnell, you are  
6 free to argue that no one said he is going to be like this for  
7 the rest of his life, no one said he needs any further  
8 treatment, you know, the total converse of, obviously, what the  
9 plaintiff testified to and what plaintiff is going to argue.  
10 So I think it's appropriate. I think your point is well noted  
11 but I think it's argument, Mr. McDonnell, and the jury can  
12 certainly weigh those factors and decide. Okay?

13 MR. McDONNELL: And, Your Honor, the plaintiff hasn't  
14 rested but I have a motion for judgment as a matter of law. Do  
15 you want to hear it now or do you want to hear it after they  
16 rest?

17 THE COURT: Here's what I am going to do: The jury is  
18 coming in at 10, right? It's ten of. Under the federal rules  
19 I can reserve. My intent, as I said yesterday, would be to  
20 reserve. So what I would like to do, since we have agreement  
21 on the instructions and the verdict sheet, which I thank you  
22 both for making that easy this morning, I would like to go  
23 right into having plaintiff rest, reserving your right to put  
24 your motion on the record, and then having you -- did you talk  
25 about exhibits? And then do closings. Are the exhibits agreed

1 upon? Are there any issues?

2 Mr. Jean?

3 MR. JEAN: Your Honor, this is what we have agreed  
4 upon. We have agreed upon the Exhibits P-43A through P-430 to  
5 be used as demonstrative purposes in closing statements. They  
6 are still photographs of the video.

7 I requested to have a stipulation that these still  
8 photos also be admitted into evidence because the jury's going  
9 to have an opportunity to see them. They are, if I may  
10 approach, if Your Honor needs to see, it is direct stamps.  
11 However --

12 THE COURT: Let me see.

13 MR. JEAN: (Handing.)

14 However, Mr. McDonnell does not agree. So that's the  
15 first -- so we agree on one thing but we don't agree on the  
16 second part.

17 THE COURT: Okay. So I get that. With respect to all  
18 the exhibits that you intend to offer into evidence, is there  
19 any objection to them other than this, Mr. McDonnell?

20 MR. McDONNELL: Yes, Your Honor. The video is going  
21 back downloaded onto the iPad.

22 THE COURT: Right, I know. Other than this. So  
23 putting this aside for a moment, are there other objections to  
24 what he wants to offer? If so, we will just go through them  
25 one-by-one and I will have him tell me what he is putting into

1 evidence.

2 MR. McDONNELL: Sure. The others, Your Honor, are the  
3 MRI scans and all those images the doctors referred to. I'm  
4 not so sure that's appropriate to send back with the jury  
5 because I'm not sure we want lay people intro to radiology and  
6 deciding to kind of see things. So that's my only concern,  
7 Your Honor, in terms of going back.

8 Other than that, Your Honor, it's clearly -- the MRI  
9 images are in evidence and they were shown to the jury. My  
10 concern is it does require some sort of technical knowledge and  
11 understanding of them and I would hate to have jurors fighting  
12 over what an MRI says.

13 THE COURT: Do you have anything that says that MRIs  
14 or any other medical studies shouldn't go back to a jury?

15 MR. McDONNELL: Your Honor, other than the long line  
16 of cases in New Jersey that the interpretation of an MRI is a  
17 complex medical opinion, requires medical foundation, and that  
18 generally for that type of evidence, it's not submitted for the  
19 jury purposes. That doesn't mean that he can't show it to the  
20 jury during closing; but my concern, Your Honor, is that the  
21 jury shouldn't substitute -- if we don't allow chiropractors,  
22 other medical people, to give opinions about MRIs unless they  
23 are trained for it, that's my concern, Your Honor.

24 THE COURT: But the jury is being told that they have  
25 to rely on the testimony and the evidence that they heard.

1 Your doctors testified about what was or wasn't there. His  
2 doctors testified as to what was or wasn't there. And I am  
3 going to tell them that -- it's been admitted. They are going  
4 to be admitted. Unless there's some case that says there's  
5 some exception that evidence that is an MRI film or an X-ray  
6 film shouldn't go back, I think with an appropriate instruction  
7 that you are going to get all this evidence, you are not  
8 doctors, I have no issue saying -- I don't think Mr. Jean would  
9 object to saying these are the exhibits that the doctors  
10 referred to and if you need to hear back the testimony that  
11 went along with those, certainly -- although I don't know that  
12 we would be thrilled to do it -- we can read it back. And I  
13 think that that's the appropriate thing in this case. They  
14 were admitted into evidence.

15 MR. McDONNELL: Then, Your Honor, with that  
16 instruction, that's great and I don't have any objection as  
17 long as all the images go back so we don't have select ones.

18 THE COURT: No. I think that they should all go back.

19 Do you have any objection to me telling them that,  
20 Mr. Jean?

21 MR. JEAN: No, Your Honor. Just to be clear for the  
22 record, what was proposed was P-45 through P-75, within --  
23 there was a P-44 but that's just demonstrative, it's not  
24 evidence. P-44 is just demonstrative.

25 THE COURT: I don't want to be confused. I have a

1 list of exhibits from P-1 through P-76. So have you told  
2 Mr. McDonnell which of all these you intend to admit and is  
3 there any other dispute and are you in agreement?

4 MR. JEAN: Yes, I have advised Mr. McDonnell each  
5 exhibit that I would like to admit and Your Honor's ruled upon  
6 that just now.

7 THE COURT: Is there any objections to any of those,  
8 Mr. McDonnell?

9 MR. McDONNELL: Yeah. I just want to make sure that  
10 we're clear. You're not going to send the demonstrative back  
11 to the jury, the surgical demonstrative?

12 MR. JEAN: That's what I just said, which is P-44, I  
13 am not doing that and I did not give it on the flash drive.

14 THE COURT: Right.

15 MR. McDONNELL: So, Your Honor, the whole set of MRI  
16 films, digital copies, is D-37 and we would just, since it's  
17 complete and they are all of them, we would just propose  
18 substituting D-37, which is that whole list of them.

19 MR. JEAN: Well, to be clear --

20 THE COURT: I think that's confusing and here's why:  
21 Because the doctors referred to them by the P or the D and I  
22 need to match them up, so, quite frankly, they should get them  
23 both. This is why it's so much more helpful when you have  
24 joint exhibits because the jury shouldn't get copies but there  
25 is no way for them to match it up to the testimony if I read it

1 back, and it may be somewhat confusing to them. So, I think  
2 it's appropriate. They are going to get defendant's exhibits,  
3 they are going to get plaintiff's exhibits. I am not sure that  
4 either of your doctors referred to every single one of those  
5 MRIs so I think it's just easier that they all go back.

6 MR. JEAN: Your Honor, if I may be heard. The  
7 exhibits that I used were the defense exhibits, candidly, then  
8 P exhibits were put upon them, but the doctor went through each  
9 one and the jury will remember the P-49 through 52 cervical, 53  
10 to 57 lumbar, P-45 cervical, P-46 cervical, P-47 lumbar, P-48A  
11 and B the lumbar X-ray. So the doctor put in front of the jury  
12 what they reviewed. So I think that's going to be fresh in  
13 their minds.

14 The defense exhibits, I don't think that -- they're  
15 the same images. So if we're giving them both, we're going to  
16 confuse them. And just to be clear, it's one -- they are one  
17 set of images that are being submitted.

18 THE COURT: Here's the problem: The testimony of the  
19 doctors referred to them and the questions asked were phrased  
20 as P exhibits or D exhibits.

21 This is what I am going to tell them: You've heard  
22 testimony from both doctors. The way litigation works is  
23 lawyers mark their exhibits separately, as you saw these were  
24 videotaped. To avoid any confusion about what you might  
25 remember about the testimony, you are going to get them.

1 They're the same images but they are marked P's and they're  
2 marked D's. That's what I am going to tell them. I think they  
3 can follow instructions. I don't want them to think that just  
4 because there is 40 in the packet that that means there was 40  
5 done versus 10 or 20. I think that that's a fair, balanced  
6 instruction. Otherwise, they shouldn't go back at all, which  
7 doesn't make sense. So, to me, that's the appropriate balance  
8 to strike. So that's what I will tell them before the evidence  
9 goes back.

10                   Have you given Ms. Minix the flash drives? And you  
11 have all reviewed each others?

12                   MR. McDONNELL: We have, Your Honor.

13                   MR. JEAN: Yes.

14                   THE COURT: So there is no other exhibit issues?

15                   MR. McDONNELL: Only that we are going to add our  
16 images on to the flash drive.

17                   THE COURT: The only thing you do need to do, though,  
18 each of you, I know although you are in agreement, you need to  
19 at least tell me for the record by exhibit number what's going  
20 back to the jury. So can we just do that now while we are  
21 waiting for the jury to come up?

22                   Mr. Jean, I am getting a little concerned, it's 9:58,  
23 the jury is going to be here at 10 and I don't see your client.  
24 If he is not here, we're starting.

25                   MR. JEAN: Can I call him?

1                   THE COURT: Why don't you do that. I will start with  
2 Mr. McDonnell. You can step out.

3                   MR. JEAN: I just want to follow what's going on.

4                   THE COURT: All I am going to ask Mr. McDonnell to do  
5 is to go through his exhibit list -- or I was going to start  
6 with you -- and just put on the record what's on the flash  
7 drive that's going back to the jury. You have all agreed that  
8 they are being admitted subject to the few rulings I made, but  
9 we need to officially put on the record what those exhibits are  
10 and there is no reason to do that in front of a jury.

11                  Is one of you prepared to do that to start?

12                  MR. McDONNELL: I am, Your Honor.

13                  THE COURT: Let me get my list so I have my list. Go  
14 ahead.

15                  MR. McDONNELL: Your Honor, J-1, J-2, J-3, which are  
16 the videos.

17                  THE COURT: Okay.

18                  MR. McDONNELL: The excerpts from D-2, which were  
19 shown to the jury, and D-50. And then we are going to add  
20 D-37, which is a complete set of digital copies of the images.

21                  THE COURT: Anything else?

22                  MR. McDONNELL: No, Your Honor.

23                  THE COURT: Okay. Mr. Jean, from your perspective,  
24 from your list, which exhibits?

25                  MR. JEAN: Thank you.

1                   The plaintiff introduces into evidence P-45 through  
2 P-75 as exhibits into evidence.

3                   THE COURT: Okay.

4                   MR. JEAN: And Your Honor has it in front of her,  
5 the --

6                   THE COURT: I want to talk about these, the stills.

7                   MR. JEAN: I want to just call them out.

8                   THE COURT: P-43A.

9                   MR. JEAN: P-43A through P-430.

10                  THE COURT: I don't have a P-430 on the list that I  
11 have for you but I will add it. What's the timestamp on that?

12                  MR. JEAN: Your Honor, P-430 is 8:15:54, if I may  
13 approach, Your Honor.

14                  THE COURT: Yes. Mr. McDonnell, what is your  
15 objection to the stills going back? Is there some question as  
16 to authenticity? They do have a timestamp on them. You have  
17 both gone through the video ad nauseam and stopped it at  
18 various points. So what's the issue?

19                  MR. McDONNELL: Your Honor, a lot of these stills have  
20 not been shown to the jury, only the video was shown, and my  
21 concern, under the best evidence rule, is that the jury has the  
22 video and they should be permitted to stop it or look at it and  
23 that showing stills that Mr. Jean hand selected is essentially  
24 argument that's going back into the jury room that he thinks is  
25 important to his case as opposed to, here's the whole video,

1 remember what you saw. And I think it unfairly emphasizes the  
2 points in the video that Mr. Jean wants to make.

3 THE COURT: Okay. Mr. Jean, did you show any of these  
4 stills to the jury during the trial? I recall you using the  
5 video and stopping the video.

6 MR. JEAN: The stills -- well, I am going to answer  
7 Your Honor's question. How was it submitted? Well, we took  
8 the deposition of Ms. Gardner and we laid the foundation when I  
9 was saying Mr. Brito (phonetic), who's our law clerk, to stop  
10 and take the photographs. So it's always been known that I  
11 was, yes, indeed, making emphasis on certain stops and starts.  
12 Unfortunately, during the presentation of Ms. Gardner, the  
13 videographer didn't show the video, but to be clear, to be  
14 transparent, we know what we're talking about. So here we're  
15 having the -- I think I've answered the question. I'm going to  
16 answer another question here.

17 We have the video. The jury is going to see the  
18 video. I'm just attempting, yes, to certainly make a point,  
19 but there's no dispute, stop, pause, reflect, there's a  
20 particular moment of time. I don't think there's any prejudice  
21 to anyone.

22 THE COURT: No, I don't think that's the issue,  
23 though, and I think Mr. McDonnell's correct. The video is  
24 going back. They can stop it whenever they want. You stopping  
25 it and using snapshots in your closing argument is essentially

1 argument that these are the important parts of the video and  
2 that's, I think, for them to determine. I'm sure, because,  
3 quite frankly, from where they were seated, I am not sure how  
4 well they could see the video, given that you guys were putting  
5 it up on here. I could see it fairly well because my screen is  
6 right here. And so I think they are going to want to look at  
7 the video and I think they probably will look at the video on  
8 the iPad. Again, that's another reason why we like the iPads.  
9 I don't want to call them back out and put it on the screen  
10 when they say we want to see it better. I think it's much  
11 clearer for them to do that. I think that's sufficient.

12 I think it's unfair argument to allow selected  
13 versions that were not marked and used during the trial as  
14 exhibits. So I don't think there is certainly any prejudice to  
15 plaintiff. You can use them in your closing. You can tell  
16 them these are the parts of the video I think you should go  
17 back and look at, and I think that that's sufficient. Okay?

18 MR. JEAN: That's fair. Thank you.

19 THE COURT: All right.

20 MR. JEAN: If I --

21 THE COURT: And they are not on the jump drive,  
22 correct?

23 MR. JEAN: They are on the jump drive. I guess it  
24 would be easier to take them off than to upload them so --

25 THE COURT: Do you want to give them back their drives

1 and have them -- did you already upload them on the iPads?

2 THE COURTROOM DEPUTY: No.

3 THE COURT: Give them back their drives and let them  
4 fix what they need to fix. While we are doing closings, Ms.  
5 Minix will have them put on the iPads.

6 Anything else with respect to exhibits that we need to  
7 address? It seems like we've addressed everything.

8 MR. JEAN: That's it. Ms. Minix can delete them off,  
9 right?

10 THE COURT: We don't do that. You are going to do it  
11 because God forbid there is a mistake, an exhibit goes back  
12 that shouldn't go back, I don't want to be responsible for it.  
13 Go ask the prosecution team in Mr. Menendez's case who let nine  
14 exhibits go back that the Court ordered be redacted and now  
15 they want a new trial. I don't do that. I do that in every  
16 case. I say, it's your responsibility, I am not doing it, and  
17 it's not hers.

18 (Exhibits P-45 through P-75 received in evidence.)

19 (Exhibits J-1 through J-3 received in evidence.)

20 (Exhibits D-2, D-37, D-50 received in evidence.)

21 THE COURT: How long do you expect your closing to be,  
22 Mr. McDonnell?

23 MR. McDONNELL: Close to an hour.

24 THE COURT: Okay. So what might work is we will take  
25 a morning break right after your closing. I have an 11:00

1 call. Off the record.

2 (Off-the-record discussion.)

3 THE COURT: What is the amount of medical expenses?

4 Did you figure it out? Because that needs to be put into the  
5 instructions.

6 MR. McDONNELL: 38,5.

7 THE COURT: 38,500? Is that correct, Mr. Jean?

8 MR. JEAN: Yes, Your Honor.

9 THE COURT: We need to make that change as well.

10 We will make those couple changes and give you the  
11 final copy. And that will be what goes on the docket and then  
12 the verdict sheet. So I will need both of them to read after  
13 closing.

14 I will give the time-unit instruction before.

15 So when the jury comes in, I am just going to ask,  
16 does plaintiff have any more witnesses? Plaintiff will say no.  
17 I will ask, does defendant have any more witnesses? You are  
18 going to say, no, you rest. I will give the time-unit  
19 instruction, explain we are going to have closings. We will  
20 break briefly after Mr. McDonnell's closing. Then we will come  
21 back and have plaintiff's and if I need to break, I will, and  
22 then we will have the charge.

23 I would like to, when they come in, we do give them  
24 lunch when they deliberate, so Ms. Minix will give them the  
25 form to fill out for what they would like to order for lunch.

1 So if we start at 10, we break for a few minutes, hopefully it  
2 will be right around 12:30ish, 12:45ish. So they can break,  
3 have their lunch and start deliberating.

4 I do send the charge back so they will get eight  
5 copies of the charge.

6 One thing we did not address -- I have to wait for  
7 Mr. Jean to come back in. Here he is.

8 Mr. Jean, one thing we did not address is the two  
9 alternates. So 7 and 8 are the alternates. Generally I ask  
10 counsel at the end of every case, but it's certainly your  
11 prerogative, when you have -- it's not a long case but when you  
12 have people sit here and listen to testimony, I always ask  
13 counsel if they have an objection to letting all eight  
14 deliberate.

15 Is there an objection, Mr. Jean, to having all eight  
16 deliberate or do you want the two alternates excused, which  
17 would be Juror 7 and Juror 8?

18 MR. JEAN: Sixty seconds, literally.

19 All jurors, Your Honor.

20 THE COURT: All?

21 MR. JEAN: Yes.

22 THE COURT: Mr. McDonnell, do you have any objection  
23 to having all eight deliberate?

24 MR. McDONNELL: Yes, Your Honor, all eight.

25 THE COURT: So we will tell them we decided all eight

1 because they have been here for three days, four days, they've  
2 paid attention, we are going to have all eight deliberate and  
3 the parties agree to that. I will tell you the last trial I  
4 did when jurors were here for literally a month, and we excused  
5 four alternates, because it was a criminal trial, they were not  
6 happy. The one woman wanted to leave immediately. No, you  
7 have to wait, that's why, you have to wait. So I think it's a  
8 good thing. So thank you.

9 THE COURTROOM DEPUTY: All rise for the jury.

10 (The jury passes through the courtroom.)

11 THE COURT: You can be seated.

12 MR. McDONNELL: Your Honor, while they are getting  
13 ready, can I just head to the restroom?

14 THE COURT: Yes, I was going to say we'll take a quick  
15 minute break, five minutes, and as soon as they are ready. So  
16 five minutes I will be ready to bring them out. We will take a  
17 five-minute break. I will be right back.

18 (Brief recess taken from 10:09 a.m. until 10:19 a.m.)

19 THE COURTROOM DEPUTY: All rise.

20 THE COURT: All right. Please be seated.

21 Anything else we need to discuss before I bring the  
22 jury out?

23 (No response.)

24 THE COURT: Okay. Bring them out.

25 (The jury enters the courtroom at 10:19 a.m.)

1 THE COURTROOM DEPUTY: All rise.

2 THE COURT: Please be seated.

3 Good morning, everyone. Thank you for coming in a  
4 little later. We are going to proceed with a few things but  
5 let me ask you first, has anyone heard, read or seen anything  
6 about the case that you have not heard in the courtroom?

7 (No response.)

8 By a show of hands and shake of heads, that's a no.

9 Mr. Jean, does the plaintiff have any further  
10 witnesses?

11 MR. JEAN: The plaintiff rests.

12 THE COURT: Okay. Mr. McDonnell, do you have any  
13 further witnesses?

14 MR. McDONNELL: No, Your Honor, subject to our  
15 understanding.

16 THE COURT: Yes.

17 So ladies and gentlemen -- you may be seated -- the  
18 parties have closed the testimony and the evidence, so let me  
19 explain to you what will happen next.

20 First we will have closing arguments. We will have  
21 arguments starting with the defendant. The defendant goes  
22 first, the plaintiff goes last because the plaintiff has the  
23 burden of proof. So it's the reverse of opening statements.  
24 Okay? We will take a break between the two statements for a  
25 few moments and then plaintiff will give his closing. We can

1 take a break if we need to and then I will give you the charge.  
2 The charge is the written instructions that is the law that you  
3 have to apply to the facts. You will each have a copy of them  
4 and I have to read them to you but we will read them and go  
5 through them, and then I will go through the verdict sheet with  
6 you and the questions that you will need to answer and how you  
7 do that and some of the logistics of deliberation. So that's  
8 how our morning will proceed.

9 I am hoping, based on my conversations with the  
10 lawyers, that we should be done right about the time that we  
11 would normally break for lunch or slightly thereafter. So we  
12 will have your lunch ready so when you go back to deliberate,  
13 that will all be there for you. Okay? So that's how we are  
14 going to proceed this morning.

15 Just so the record is clear, the lawyers and I have  
16 previously gone through all of the exhibits and I received all  
17 the evidence and the evidence will go back to the jury room  
18 with you on iPads. Jurors tend to like that, particularly in a  
19 case like this where we have videos. So you can watch that,  
20 you can look at it and any of the other evidence that the  
21 parties have moved into evidence and Ms. Minix will have an  
22 iPad for each of you, and that's how the evidence will go back.  
23 Okay? All right.

24 Anything else before we close, Mr. McDonnell? I do  
25 need to do the one instruction that we discussed.

1 MR. McDONNELL: No, Your Honor.

2 THE COURT: Okay. One of the things I want to tell  
3 you, this is an instruction that we give specifically before  
4 closing arguments, and that is that counsel is permitted to  
5 argue to the jury the appropriateness of what we call a  
6 time-unit calculation in determining damages for pain,  
7 suffering, disability, impairment or loss of enjoyment of life.  
8 Counsel are not permitted to mention specific amounts of money  
9 for calculation of such damages. They are permitted, however,  
10 to argue that you may employ what we call a time-unit  
11 calculation; that is, to consider an amount of money in  
12 relation to an amount of time when determining damages.

13 So I charge you and instruct you that the argument of  
14 any counsel during closing arguments with reference to the  
15 calculation of damages on a time-unit basis is argument only  
16 and it's not to be considered as evidence. Counsel's  
17 statements are simply a suggestion or argument to you as to how  
18 you might determine damages for pain, suffering, disability,  
19 impairment and loss of enjoyment of life if you find liability  
20 in this case.

21 You are free to accept or reject these arguments as  
22 you deem appropriate, and you are required to make a  
23 determination on the amount of damages, if you find liability,  
24 based on the evidence that's presented and the instructions  
25 that I will give you before you start to deliberate.

1 Okay?

2 Mr. McDonnell, anything else before we close?

3 MR. McDONNELL: No, Your Honor.

4 THE COURT: Okay. You may proceed.

5 (CLOSING ARGUMENT BY MR. McDONNELL)

6 MR. McDONNELL: May it please the Court.

7 Good morning. This is my opportunity to give the  
8 closing argument or what I prefer to call summation. My  
9 intention is to try to sum up the evidence so that when you get  
10 the verdict sheet and you hear the Court's instructions, you  
11 are going to be able to get answers to those questions proper  
12 and render a true verdict.

13 Jury service is the last service that we have where  
14 the government doesn't demand your money in taxes but it  
15 demands your time and it's mandatory. We don't have a draft  
16 anymore but this is really the last service where the  
17 government says this is so important that we're going to enlist  
18 our citizens to participate in a process to try to reach the  
19 truth and to try to achieve justice. You took an oath to  
20 follow the Court's instructions and to follow the evidence and  
21 to follow the law, and I'm confident that your verdict will be  
22 based upon those particular issues.

23 In a civil case, the plaintiff has the burden of  
24 proof. Typically the way we kind of symbolize it or give you  
25 that picture is that when you weigh the evidence on both sides,

1 if the scales are equally tipped, the plaintiff loses.  
2 Plaintiff has to produce enough evidence that in your mind it  
3 says to you this is more probably true than not true. And the  
4 Court will give you all these instructions. We did get them in  
5 advance and I tried to make them as accurate as possible but at  
6 the end, the Court will give the instructions and you will have  
7 them in the jury room and that's what you have to rely upon.  
8 This is my guide. I don't want to misstate something so I want  
9 to make sure that I am as faithful as possible to it.

10 I told you in the beginning what I called the four  
11 C's. This is when you talk about liability or fault for this  
12 particular incident. And the four C's, as I told you, is  
13 credibility, who's telling the truth. Is there credible  
14 evidence? Because if you don't get past that part, if you  
15 don't find credible evidence, there's not much further you can  
16 really go after that.

17 The next C is care. When we talk about care, we're  
18 talking about what is the duty of care? What is the  
19 responsibility of Walmart and what is the responsibility of  
20 Mr. Pataki and what's the standard you're supposed to use to  
21 test that conduct? And before I forgot to introduce Mr.  
22 Martinez, he is the store manager. He wasn't here on the first  
23 day but this case is important to him and he trusts also that  
24 you'll follow your oath. So that's the second C is care.  
25 What's the care, what's the test for care?

1                   The third C is causation and the fourth C is  
2 comparative. And you are going to get a verdict form and  
3 instead of saying care, the question is, was this party  
4 negligent or was the other party negligent? And what  
5 negligence means is did that person follow the standard of care  
6 that the law requires that we all follow and we all have our  
7 own standard.

8                   This is the instruction for credibility and there's a  
9 couple things that I think are important to highlight. And the  
10 one question you are allowed to look at is whether a witness or  
11 a party has an outcome in the case. In other words, do they  
12 have an interest in this case? That's one of the issues you  
13 can consider in determining if this person is credible or not  
14 credible. In other words, when they testify, does it matter to  
15 the result? Do they have skin in the game is another way of  
16 terming it. But these are all the factors you can use in  
17 determining credibility. But at the end of the day, it comes  
18 down to the same tools that you use every day in your ordinary  
19 life. Does what this person say sound true? Does it make  
20 sense to me? All that is part of the first C, a part of  
21 credibility.

22                   The next thing you promised to do is that you would  
23 give equal treatment to both parties. No bias, no sympathy, no  
24 prejudice whatsoever, and that's really important in this  
25 particular case. And I will tell you why. Because it's

1 natural for all of us to be sympathetic, particularly when one  
2 party is a company, I understand the company is made up of all  
3 the people who work in the store, including Mr. Martinez and  
4 his staff, but it's natural to hear if somebody's gone through  
5 something to have that sympathy towards that person and, in  
6 fact, project our own feelings of maybe what happened in our  
7 life onto that person. And in this case, it's important that  
8 you set that aside when you decide this case and you promised  
9 in the beginning that you would decide this case based upon  
10 reasoned jurors on the facts of the case and not sympathy, not  
11 prejudice, or anything else.

12 An individual in a civil case does not get the benefit  
13 of the doubt. It's still the same burden of proof that you  
14 have to weigh. There is no higher standard. If you recall  
15 during voir dire you were asked about that. Does anybody  
16 believe that Walmart or any other company should be held to a  
17 higher standard? In this courtroom, all parties are treated  
18 equally, including Walmart.

19 So here's the big question in this case: Who is  
20 Mr. Pataki? We know that he has an interest in the outcome of  
21 the case. Parties always have an interest in the outcome of  
22 the case. And, generally -- and, again, this is what you use  
23 in your common sense and your common world -- people have  
24 presence on social media, they have cell phone pictures, they  
25 have partners, they have spouses, family, co-workers,

1       neighbors, roommates, girlfriends, all of these group of people  
2       that together and collectively identifies us. And in this  
3       case, you heard absolutely no evidence of any of that, the  
4       things that you typically use to weigh who a person is.  
5       There's not a single witness or a single document that is from  
6       before the incident. There's absolutely nothing. You've heard  
7       no explanation as to why there's nothing from then. Not a  
8       picture of him playing tennis, not a social media post showing  
9       him doing any sort of activity, nothing. We walk around now,  
10       certainly at least since 2010, with almost our lifetime  
11       available to us to show people, no, really, this is who I was,  
12       this is what I was doing. And you haven't heard any of that  
13       evidence.

14           Who was he with that night? Who drove him home at a  
15       quarter of two in the morning? Who was he living with? You  
16       haven't heard any evidence of that. It's as if this gentleman  
17       just spawned spontaneously at a Walmart on June 7, 2015. And  
18       in your common experience, does that make sense?

19           Mr. Pataki's introduction, I took the opportunity to  
20       speak to our court reporter and have her transcribe his  
21       testimony from the Court so that I would make sure that it  
22       would be accurate for you when I talked about it. And this is  
23       his trial testimony. This was his introduction to tell you who  
24       this person is and what he's about.

25           The question is: "Mr. Pataki, where do you live?

1 "In Brooklyn.

2 "How long have you lived there?

3 "In the last three years, I lived in Brooklyn.

4 "Mr. Pataki, how much do you weigh?"

5 No How did you grow up? What's your education?

6 What's your background? All the things that you would have if  
7 you were sitting at a table or you were at a church gathering  
8 or a civic gathering and you started to have a conversation,  
9 and one of the things you would ask a person and one of the  
10 things you would share with a person to let them know who you  
11 are and where your position is or whatever your place is in  
12 society. You have been given no evidence whatsoever about this  
13 gentleman, nothing. Everything begins on June 2015.

14 So when asked, "Who were you living with," this,  
15 again, is trial testimony -- "Were you living with other  
16 people?"

17 "Yes.

18 "So there were other people who knew what your  
19 activities were, correct?

20 "Well, not necessarily, no."

21 So in this case, there's just nothing. He's presented  
22 to you no evidence. This case or this claim has been involved  
23 almost ten years. There's not a single person who came in and  
24 said, oh, I know Peter, this is who he was, I was living with  
25 him at the time. There was an intentional decision by the

1 plaintiff not to share any of that with you, and to start it  
2 off with, how much do I weigh.

3 When asked initially, he said he's a painter, that's  
4 what he said, on my cross-examination, well, that's what I do.  
5 If you remember what he said to Dr. Vizzone, and it's in his  
6 records, and, in fact, Dr. Vizzone pointed that out to me, no,  
7 look, I put construction. And that's the same note that is in  
8 another doctor's note from that time.

9 So in this particular case, you have a situation where  
10 there's evidence that he was doing heavy work and heavy labor  
11 but there's nobody that's come in to tell you about that or to  
12 share with you and say, hey, I can do that. It's their case.  
13 They had a choice of what witnesses they wanted to put on and  
14 they've said we're not going to share anything.

15 He agreed he's working 60, 70 hours a week but  
16 painting is not hard construction work. And if you remember to  
17 his doctors he didn't say he was a painter. He said I do  
18 construction. That was his training. He was trained in HVAC  
19 work. The gentlemen pull out heavy air conditioners and put in  
20 heavy heating units, install ductwork, that's his training, and  
21 that's what he told his doctors, that's what I do. And I also,  
22 on the side, I do things where I lift people and I work that  
23 way. And he said, oh, no, no, no I use a lift. And that  
24 raises the question. If he uses a lift and it's not heavy  
25 work, well, that's the type of things that he could continue to

1 do. But he shared none of that evidence with you. He made a  
2 conscious choice to say, I'm going to show you just right here.  
3 That's what this case is about, is you have to decide a case  
4 that says, here's a person, a human being, all the things that  
5 make us up, and the question is, I'm going to show you nothing  
6 other than what happened and what you see in the courtroom.

7 You see him using a cane. And I was expecting  
8 Dr. Vizzone to come in and explain to you why he needs a cane.  
9 He has weakness in his leg, he has a gait problem. There were  
10 hours of questions of the defense doctors. You're not the  
11 treating doctor, you don't know this guy, you don't know this.  
12 That was the treating doctor they chose to bring in. Did he  
13 say one word that his condition requires him to use a cane or  
14 one word that he's going to have disability forever? Nothing.  
15 He didn't even tell you what his prognosis would be. He said,  
16 I haven't seen this man in a couple years. That's the person  
17 he chose to present to you. Again, just, I'm only going to  
18 show you a tiny bit and I'm not going to show you the rest.  
19 There are consequences to that. Because when you go back there  
20 and you have to put the things on a scale on the plaintiff's  
21 side, you don't have anything to put in except what someone  
22 showed you in a courtroom that you know nothing about.

23 You're allowed, and the Court give you this  
24 instruction, you're allowed to consider what we call  
25 circumstantial evidence. You're allowed to consider common

1 sense. In other words, you're allowed to consider where the  
2 store is, where he lived, how he got back and forth, how he  
3 supports himself in Brooklyn, a place that doesn't even have a  
4 Walmart or a cheap place to shop. Not just for the past ten  
5 years, but for the time before. You're allowed to ask those  
6 questions, and say what do I put in that scale to help me  
7 render a verdict to him? You have nothing. And it's not  
8 because of Walmart. He chose not to give you any evidence.

9 There's been no evidence -- the Court's going to  
10 charge you that you can consider the interests of a person, but  
11 there's no evidence of any disinterested person on the part of  
12 the plaintiff that doesn't have a financial interest in the  
13 outcome of the case.

14 He mentioned Florida. He mentioned training as a  
15 construction worker. He didn't mention any volunteer or civic  
16 organization. There is no mention of any family. I think he  
17 might have said his mom gave him a flu something, but other  
18 than that, there's no, here's my cousins, here's my friends.  
19 Folks, this is not ordinary human discourse because this is  
20 what we talk about, this is where we live. And the purpose of  
21 this case is to tell you, this is who I was, and this is how  
22 this accident affected me, and this is why you should believe  
23 me.

24 There is absolutely no evidence of what this gentleman  
25 has been doing in the past ten years. Where's he living? He

1 says Brooklyn. Brooklyn is a big place. How's he supporting  
2 himself? Where groceries certainly cost so much that he goes  
3 to New Jersey to buy them. How's he getting around? How does  
4 he spend his time? And there's that old line or the movie, I  
5 get by on the kindness of strangers. Who are these people?  
6 There's just nothing. He appeared at the store, he appeared in  
7 the courtroom, he appeared at doctors' offices, that's all you  
8 know.

9 Let's talk about the trip to Walmart. Basic stuff.  
10 Who dropped him off? Was he with someone else? What was he  
11 doing in New Jersey? He mentioned something about getting  
12 something for cats or chicken and he was going to bring his  
13 groceries back to Brooklyn. Who picked him up from the ER at  
14 quarter to two in the morning? What about the next day, who  
15 took him from Brooklyn, then the emergency room, and then  
16 allegedly over to New Jersey? Folks, we live in the  
17 Philadelphia metro area so we may not have direct experience of  
18 what it's like to get from Brooklyn, which is on the bottom  
19 south end of Long Island, go through Brooklyn, one of the most  
20 congested places in the country, go over the bridge to  
21 Manhattan, and either take a tunnel through Manhattan or go  
22 over a bridge. That's what he's telling you he did to go to  
23 medical appointments. Wouldn't you like to hear from these  
24 people? Who was he with the next day? To come in and tell  
25 you, oh, that night, Peter was really, really, really hurting,

1 he was really hurting. Nothing. Again, it's people that the  
2 lawyers hired that had an interest in the outcome of the case.

3 When you talk about the lawyer's team, he admitted it.

4 What do we know? In hours -- he left the ER at 1:42. The  
5 lawyer, Dr. Vizzone, also has a direct interest in the case.

6 Then within days there's an investigator that goes out to Ms.  
7 Gardner to take a statement, but he doesn't take a statement.

8 He writes something up and has her sign it. Then she says,  
9 well, maybe I don't know about this, and maybe I don't know  
10 about that. I don't blame Ms. Gardner and I feel bad because  
11 it looks like I'm bullying or picking on an elderly woman, but  
12 that's their witness. And the fact of the matter is within  
13 days, they were out at this woman's house. So there had to be  
14 a lawyer hired, a phone call made, a trip there, and if you're  
15 going to go to somebody to take a statement from them, don't  
16 you take a statement from them? You don't write something up  
17 and say, here, sign the second page. And this is true, right?  
18 And you sign it. And the first page isn't even initialed.  
19 And, in fact, even that statement wasn't even presented to you  
20 for you to see or you could evaluate. And it certainly didn't  
21 reflect what happened at the store that night, and I will show  
22 you in the video in a bit when we get to that.

23 There are absolutely no disinterested providers.

24 I asked him about this. And if this self-referral  
25 deal was no big deal, when you take an oath to tell the truth

1 in front of a jury, you don't take an oath to say things that  
2 are technically true. You say, I'm going to tell the truth,  
3 and the whole truth. And if the whole truth is all these  
4 providers you are going to hear from that you are going to  
5 think are really different businesses, they're actually all me  
6 and my two friends. We are business partners. The MRI center  
7 is his partner Mercadante. The rehab center is his other  
8 partner. The surgery center, that's him and another person.  
9 Everybody here is interested, everybody's involved with the  
10 lawyer, everybody has an interest in the outcome of the case.  
11 That's the evidence that you have been presented with. This is  
12 Dr. Vizzone, this is what he testified.

13 And if you have to disclose self-referral to anybody,  
14 these are companies affiliated with so-and-so, that's the way  
15 you have to do it to be straightforward. Why didn't he tell  
16 you that? Mr. Pataki treated with my office, at an MRI center  
17 that my partner runs. Why was it hidden? Why was he  
18 extremely -- you saw the way he was when I asked. Well, I was  
19 just an investor, I was just this. But the reality is the same  
20 three people were involved in all the treatment and were  
21 involved with all the lawyers.

22 Then we heard about courtesy vans. And, again, we're  
23 not in the New York metro area but, literally, evidence is the  
24 lawyer sent vans over to Brooklyn, from New Jersey, back again,  
25 and back again. Did he say that in his deposition? No. That

1 came out reluctantly. And you are allowed to consider that not  
2 only did these providers have interest but they're actually  
3 going out in the community and grabbing people. Folks, there  
4 are very good medical centers in the New York metropolitan  
5 area, including in Brooklyn. The only place that you can get  
6 treatment is not Montclair, New Jersey, miles and an incredible  
7 hassle away. And do you remember what Dr. Vizzone first said,  
8 well, I did this as a courtesy? He didn't have a courtesy. He  
9 had an Urgent Care center. So this gentleman, when he went for  
10 treatment for clearance, he didn't even go to an interested  
11 party. He went to another one of Vizzone, Mercadante and  
12 Gangemi -- I apologize, I still can't pronounce his name  
13 properly -- but that's the group. Everybody's involved and  
14 there's vans plucking people from the community to do that as  
15 opposed to an attorney. We have a lot of resources. If  
16 somebody needs help getting medical treatment, the answer isn't  
17 courtesy vans and this type of stuff where they don't even tell  
18 you what's going on and they don't even disclose this type of  
19 issue.

20 And when finally he admitted, first, the story was the  
21 girlfriend but each and every time -- in other words -- this is  
22 from the trial transcript -- each and every time that he went  
23 from Brooklyn to the office, he ultimately admitted, yeah, I  
24 got in the courtesy van, that's who I got. There is absolutely  
25 no treatment, no evaluation, no consultation from outside this

1 team. And I am reluctant to call it a ring but that's a fair  
2 description. This is a ring of people involved in all these  
3 activities.

4 I think I went over this but, by the way, where's  
5 everybody else that's part of this ring? Where are the  
6 chiropractors? Where are the physical therapists? Where's the  
7 rehab doctor? Where's this Dr. Koppel? The only doctor that  
8 came in was Dr. Vizzone. I at least have to give him credit  
9 for at least showing up and being subject to cross-examination.  
10 But, again, the plaintiff says, I went through all this  
11 treatment, I went through all this ordeal, and didn't present a  
12 single person, hey, I'm Bob the physical therapist. I worked  
13 with Peter three days a week during this time and I'm telling  
14 you he gave his all. That would be important testimony for you  
15 to hear. When you're talking about in a normal clinical  
16 situation, people trying to get people better, they have these  
17 therapists and nurses and people like that, they are the  
18 biggest cheerleaders to see these people get better. Where are  
19 they? We have Dr. Vizzone who really kind of seemed  
20 disinterested; he walked out of my office, I haven't seen him  
21 in two years.

22 This, again, is from the trial testimony. This is  
23 Mr. Pataki:

24 "Why did you stop seeing Dr. Koppel?

25 "I was told by my lawyer that I need to see

1 Dr. Vizzone because he's a certified orthopedic surgeon.

2 "So is the reason why you switched from Koppel because  
3 your lawyer said no more Koppel, go to Vizzone, correct?

4 "Correct, I didn't choose him. I didn't call him or  
5 select him."

6 Everybody's within this ring, which is supplied by  
7 courtesy vans and financial -- backdoor financial arrangements  
8 and no disclosure whatsoever about really what's going on.

9 So in the question -- this is again from trial, this  
10 is what you heard -- "So in this particular case, what's  
11 happening is your attorney is directing you to these various  
12 doctors, correct?

13 "Yeah, I follow his rules."

14 That's scary. Because that's not what's supposed to  
15 happen. Folks, doctors are supposed to try to get you better.  
16 That's the purpose of it. The purpose isn't there's rules, you  
17 see this guy, you see this guy, you see this guy. Who's  
18 directing the care here?

19 And this is the transportation. This is the  
20 courtesy -- I don't want to beat a dead horse and I apologize  
21 if during this trial I beat a dead horse. Sometimes I don't  
22 know whether people are listening and, you know, you might want  
23 to just throw something at me and say, please, stop it, I've  
24 heard enough of this type of stuff. So I apologize on behalf  
25 of my client.

1           One of the unusual things about being an attorney, as  
2 opposed to being a school teacher or some other way of  
3 communication, is you can say, hey, any questions, and move on.  
4 So I apologize on behalf of my client if there was some dead  
5 horse beating. But the courtesy vans is something that only  
6 came out at trial. Because he was asked in his deposition -- I  
7 wonder if this is another one that's going to be difficult to  
8 see.

9           So he said in his deposition -- remember, there is no  
10 such thing as an oath for trial and an oath for deposition and  
11 an oath you sign for an affidavit. An oath is an oath. And  
12 what's crazy about our society in a good way is 300 years ago,  
13 200 years ago, people would determine credibility the same way  
14 we do today. There's no magic light that goes on in the jury  
15 box that tells you whether someone's telling the truth or not.  
16 There's no expert that can come in and tell you who's telling  
17 the truth. It's normal people from the community coming out  
18 and saying, did this gentleman take his oath seriously?  
19 Remember, he is the only witness. He was asked at his  
20 deposition, when Mr. DeZao was representing him, because it's a  
21 natural, common-sense question, how are you getting from  
22 Brooklyn to Montclair, New Jersey, for an hour therapy session  
23 and then coming back? Oh, my girlfriend or this person took  
24 me. That wasn't true. It just wasn't true. That's what he  
25 testified to under oath in preparation for this case. And that

1 was a reasonable question for the attorney to ask. He didn't  
2 tell the truth.

3 I want to move on to the second C. We've talked a  
4 little bit about credibility. That's the first question on the  
5 verdict form. Do you find by a preponderance of the evidence  
6 that Walmart was negligent?

7 That C that I talked about when I first stood up in  
8 opening is care. And the standard, the test that has to be  
9 applied is reasonable care. And what we talk about is a  
10 reasonably prudent person. Who is this person? It's like the  
11 proverbial undecided voter; apparently they exist but we never  
12 meet them. But the reasonable person, that's a person who's  
13 not the most cautious and not the most bold but a person who  
14 exercises reasonable ordinary prudence in their affairs. And  
15 the same standard gets applied to Walmart. This isn't the most  
16 cautious, it's not the most bold. On a Sunday night, New York  
17 City metro area, you saw some of the video, both the front and  
18 around those registers, it's a busy store. Folks shop on  
19 Sunday night. But even at 8:00 you have employees all over  
20 that store trying to service those customers. And the question  
21 you have to say is, is this reasonable? Did you hear any  
22 evidence that something was unreasonable? I call it the circle  
23 of reason, which is if your behavior is inside that standard of  
24 reason, you're not liable. If you stand outside the circle,  
25 you say that doesn't seem reasonable, that seems out of the

1 ordinary, that's the standard that gets applied to this case.  
2 It's not the proverbial if I was put in charge of the store, if  
3 I took Mr. Martinez's job, what would I do in hindsight, but  
4 that's not the standard. The standard is what would a  
5 reasonably prudent manager do?

6 The Court's going to tell you, what's the duty of care  
7 for a retailer, any retailer. Again, nothing special for  
8 Walmart, nothing for anyone else. You have the right to expect  
9 reasonable care when you walk into 7-Eleven right next door or  
10 anywhere or a corner store. Reasonably safe condition, that's  
11 the test.

12 And then the question is, when does a retailer break  
13 that care? They break that care if they subject a person to an  
14 unreasonable risk of harm. Not a risk of harm. Life involves  
15 risks. You go to a supermarket, people drop things around you,  
16 things happen, that's a risk. You have to find that that risk,  
17 the hazard was unreasonable. That's the test. That was that  
18 second C.

19 And the problem we have with it is you've got to focus  
20 on the condition. We sat through a three-day trial and there's  
21 no evidence of what this was. Is it like a produce bag? Is it  
22 shrink wrap? Because usually when you have shrink wrap, that's  
23 sticky. Is it a Ziploc? Is it, as Ms. Gardner suggested, one  
24 of those plastic tabs that you break from a package. The only  
25 evidence, as Mr. Pataki said, was he said 7 by 4 but I'm

1 assuming he meant 7 by 14 like a piece of paper. Is it like a  
2 thick heavy plastic? We have no idea. As part of the  
3 case-in-chief, they didn't tell you this is why this piece of  
4 plastic, because it would slip on the floor or do something  
5 else like that, was an unreasonable risk of harm. When I show  
6 you the video, you are going to see there's scores of people  
7 walking through this and they're not slipping and sliding  
8 anywhere on a piece of plastic if he even knew where the  
9 plastic was. Again, what do you put in that pan for the  
10 plaintiff? You say, what did he fall on? What's this plastic  
11 piece? You can't speculate. You can't say to yourself, I'm  
12 going to try to do the job plaintiff should have done, and I'm  
13 going to think about all the things in the store that could be  
14 plastic. Ten years almost and the plaintiff can't tell you  
15 what it is he slipped on. And it's not like he got carted away  
16 in an ambulance the way they tried to get Ms. Gardner to say or  
17 he never got up or he was dazed. You saw the video. He comes  
18 back and he looks at it, kicks it. He's got his cell phone on  
19 him. He's then walking around and gathering witnesses and he  
20 can't tell you, this is the condition that I am saying to you  
21 if it's on the floor, it's an unreasonable risk of harm.  
22 Because there's lots of things that could be on the floor that  
23 are not an unreasonable risk of harm. A shopping list, a piece  
24 of paper, things that just normally customers drop, a child  
25 dropped something. We don't know.

1                   And if, the next standard of care, if you had evidence  
2 that you can put in that pan and say, hold on a second, let's  
3 give an example, corn oil on the floor, now, that's an  
4 unreasonable risk of harm. It's difficult to walk through corn  
5 oil without falling. Even if you found that he proved this  
6 piece of plastic was an unreasonable risk of harm, do you know  
7 what you have to determine next? How long was it on the floor?  
8 Because we understand that in a store people are dropping  
9 things all the time. They are putting things in their cart,  
10 you have kids over there. No one expects any grocer to walk  
11 around and follow everybody in the store and pick up after them  
12 the second something goes down. They are entitled to a  
13 reasonable period of time to discover it and a reasonable time  
14 to pick it up. So there has to be evidence of how long this  
15 was on the floor and there's none.

16                   We have surveillance video and it's, admittedly, not  
17 the highest quality surveillance video on the planet. And you  
18 can't speculate is there other video because the plaintiff had  
19 literally hours of the surveillance. He's got the right to see  
20 any cameras and make that request, say, hold on to this video,  
21 here's where my client was. There just isn't any evidence.  
22 This was in 2015, it's clearly an older system with a fixed  
23 camera, not one of those super-secret. So when you go back  
24 there, we have what we have, and there is no evidence that  
25 Walmart changed it or anything else like that. They grabbed a

1 view or there is some other view, there just isn't any  
2 evidence. We certainly have cameras in the store. This is the  
3 meat aisle and paper plates aisle and most of these cameras are  
4 for security that people are not sticking chicken under their  
5 jacket, generally, and walking out of the store. So you have a  
6 view of the main aisle and that's what you see.

7 They have the right -- there's a judge here -- well  
8 before this: Your Honor, I want to speak to the people who  
9 were working that night. Produce the time cards of all the  
10 workers in this department. I want to depose them. I want to  
11 do this information. None of that do you have. It's not  
12 Walmart's job to do anything in this case other than to say  
13 what's your evidence? It's the plaintiff's job to go out and  
14 provide you with the tools you need and the facts you need to  
15 reach a verdict. You know that Walmart has time cards. You  
16 know that Walmart keeps track of everybody working in the  
17 store. There is not a single witness from Walmart being  
18 called. And if he stands up after the case and says, well, why  
19 didn't Walmart call anybody? It's because nobody was presented  
20 at all.

21 So in this particular situation, I'm going to go  
22 through this video and I'm happy because I think this is a  
23 little more -- this is kind of a crazy system that I -- it goes  
24 blank when I'm in the office, so I apologize if I have my back  
25 to you.

1 (Video played.)

2 MR. McDONNELL: We are around 7:30. So let's go to  
3 where the action happens.

4 So let's look at what's happening in the store.  
5 Around 8:00. You should know by now where the accident area  
6 here is in the foreground. I am not going to blow it up like  
7 that because it just looks like color blobs so I'm going to try  
8 to keep it in regular visual. There is an iPad back there you  
9 can play around with. But you see the date and time. This is  
10 7:59. There are people walking continuously, and I will move  
11 it through, in the area where the plaintiff fell. Do you see  
12 all those people walking in the same area, coming in, moving  
13 around? And we move forward. I think we start to see  
14 Mr. Pataki right here at 8:03, yes.

15 Okay. Here's Mr. Pataki. He comes in the scene. He  
16 is behind the flag now. See him walking in past the coolers on  
17 the bunker? I have a little -- my videographer was nice --  
18 that's Mr. Pataki. Again, you have continuously people that  
19 are walking in the area where the accident happened.

20 We are at 8:05:46, he is out by the chicken area.  
21 There's Mr. Pataki. And remember also, you're looking at this  
22 from a high level with all this glare from the skylights and  
23 the fluorescent lights and you can see there's sections of the  
24 floor that just kind of look shiny.

25 So there's Mr. Pataki and here's Ms. Gardner. And

1 there he falls. He gets right up. And there's Ms. Gardner --  
2 Gardner. I'm sorry, I apologize if I am mispronouncing her  
3 name. And she doesn't run over and say, oh, my gosh, I gotta  
4 get this guy. She does look. And then she walks in the  
5 opposite direction.

6 Then Mr. Pataki is out of view, and he comes into the  
7 next sequence. And there's Mr. Pataki again. So I am going to  
8 just run it from 8:14. I will use my handy-dandy laser  
9 pointer. He's going to be coming from here. This is the area  
10 of the incident. And he walks right by it. He doesn't look at  
11 anything, he is not looking down, and he walks past this area.  
12 These are just regular aisles. And it looks like there's  
13 something like either a glare or something on the ground which,  
14 again, has never been identified but I am going to back up to  
15 the fall again and you'll see, this area doesn't even look like  
16 it's moving in response to his fall. There's Mr. Pataki again.  
17 And then he seems to kick it but it doesn't look like anything  
18 moves.

19 He comes back to the chicken area. At this point it's  
20 8:09. The accident is at 8:06:30. Mr. Pataki is by the  
21 chicken cooler. He says at this point he's checking for  
22 electric wires or something.

23 Here's Mr. Pataki. And, again, does this gentleman  
24 look like he's taking out his cell phone. He's looking down,  
25 he's looking around. Then he walks out of view.

1               Okay. This is almost three-and-a-half -- well, let's  
2 see, 8:10 -- about three-and-a-half minutes after the accident  
3 and there was just no commotion around here, like somebody has  
4 fallen or an object being on the ground or anything else like  
5 that. And all this, you gotta call the manager and whatever  
6 Ms. Gardner was doing, like she doesn't appear -- this is  
7 Ms. Gardner's daughter in the green sweater. There's a little  
8 kid running around.

9               So if we can just go back to the fall.

10               If we can go back to the fall. What's interesting is  
11 -- I'm using my finger to slide this but it moves by itself.  
12 Here's Mr. Pataki walking out. He walks forward. Gets up. It  
13 doesn't look like anything's moved. So whatever that is, that  
14 spot, he's walking towards something, he falls, and there just  
15 isn't any evidence that there's anything -- and, by the way,  
16 people continue to walk into this area. There's a group.  
17 There's no evidence of anything moving or changing. And then  
18 we have the other part, at the register, gives you a sense of  
19 how busy the store is and what Mr. Martinez's job is.

20               I thought this was an ambulance driver but I have to  
21 make sure I clarify that. I think this might be somebody from  
22 Walmart who's walking with Mr. Pataki.

23               Here's Mr. Pataki coming around the corner. He's  
24 walking, he's chatting with this gentleman. And it's not the  
25 story that Ms. Gardner was told to say when he fell, he sat on

1 pallets, the ambulance came and wheeled him out of the store.

2 So the question is -- again, I apologize for the  
3 lightness of this. So this is Mr. Pataki's testimony. I put  
4 the pages, Page 86 and Page 89.

5 "Okay. You were the first one -- after this fall you  
6 claim this plastic is what caused you to fall, correct?"

7 This is his trial testimony. This is what you heard.  
8 I'm just reminding you.

9 "At that time I was investigating if it's, like, water  
10 underneath it, you know, but what -- I didn't see any water."

11 So at the time right after he fell he wasn't sure what  
12 he fell on.

13 I said: If you look at where the chicken is, do you  
14 see where -- that you're looking at the area, looking at the  
15 chicken, between the flag, you have the pole?

16 Not the chicken, the cooler. He's looking to see if  
17 it's water coming from the cooler or, in particular, I was  
18 looking for some kind of electrical issues, electric which  
19 caused me to shock. You saw where that chicken department was.  
20 It's nowhere near the accident.

21 The evidence is from the stand that Mr. Pataki still  
22 is unsure what exactly caused him to fall.

23 "You weren't investigating the scene when you went  
24 back to the chicken area, correct?

25 "Well, at the chicken area, I investigated in

1 particular the cooler itself, not the chicken.

2 "So are you saying at the time of the accident you  
3 thought perhaps something in that cooler, at least 40 feet away  
4 from that area, is what caused you to fall?

5 "Well, not 40 feet away. The cooler is, like, six  
6 feet away from the plastic."

7 Well, that's clearly not true.

8 "I was looking for loose electrical cable to identify  
9 why I have shock."

10 So is Mr. Pataki claiming that he got shocked in the  
11 chicken place but didn't feel it until he walked towards the  
12 corner of the area and then he had a shock and he fell? None  
13 of this makes sense. You're allowed to use your common sense  
14 and what you saw on the video. Again, he repeats it.

15 "You walk away from the accident 8:08 and that's the  
16 point where you walk -- and then we see you come back and you  
17 kick the plastic. Then you claim you're walking back to the  
18 chicken aisle to see if there was an electronic problem?

19 "Yes, loose electrical cable or loose water coming  
20 from the cooler."

21 This is where he says it's six feet away.

22 "Again, I wasn't looking at my cell phone. I was  
23 looking for a cooler, particularly if it had any loose water  
24 would transmit electricity." Is he saying he got water on his  
25 shoe near the cooler and slipped there? It's really not clear.

1 Once he is off script from the direct and he's got to explain  
2 what he did in there, he's throwing stuff up. And every one of  
3 us in our daily life has had experience with that when you talk  
4 to someone, you ask them something, and you can tell they're  
5 kind of like, oh, maybe it's this or maybe it's that. That's  
6 what you saw on the stand. There's no evidence of an  
7 electrical problem or anything else like that.

8 Then we have this whole -- the manager and what really  
9 happened. I think this is significant.

10 There was -- he says it sounds like he called 911.  
11 Called 911, the police comes to the store. So there should be  
12 a police report. That would be helpful for you to see. That  
13 EMS report, that would be helpful to see. Other disinterested  
14 people who could tell you this is what this gentleman was  
15 telling me at the time. You don't have any of that.

16 This is the next day. I just want to go real quickly  
17 just to kind of help you clear up some stuff with Ms. Gardner  
18 and about where this whole white coat stuff came from.

19 Okay. So several minutes after the accident, this is  
20 8:17, do you see the lady with the bright green sweater?  
21 That's her daughter and that's Ms. Gardner. So all this stuff  
22 about the white jackets and the pallets, here's the Gardner  
23 group, that's Mrs. Gardner, she's passing by a man in a white  
24 jacket doing that. But it has nothing to do with an accident  
25 that happened at this point ten minutes ago over here.

1                   And then you're going to see Mr. Pataki come in the  
2 scene in here. Again, this is 11 minutes after the accident  
3 and Mr. Pataki's walking around the store. He says, well, I  
4 wasn't thinking about a claim or anything else like that. But  
5 what does he do? He then walks over to the Gardners. And then  
6 there's some investigator that comes to her house several days  
7 later and she clearly remembers stuff with the white coat, it  
8 just doesn't have anything to do with the accident. He has a  
9 conversation, puts her number in his cell phone. That's the  
10 first time in any picture we see any motion of anything after  
11 the accident, there is no rubbing his neck, there's no back,  
12 there's nothing like that. So that's the Gardner stuff.  
13 Unfortunately, it wasn't my video but that's what was going on  
14 in the video, when you were, like, what's going on, I see a  
15 woman on her cell phone and she's being asked about a video.

16                   So then after getting out of the emergency room at  
17 1:42 in the morning, he goes back to Brooklyn, supposedly, at a  
18 place you have no idea where it is, with people you have no  
19 idea who he was living with, brought by someone you have no  
20 idea who brought him there. The next day he goes back to some  
21 Brooklyn emergency room. Then he says, well, I'm going to have  
22 to wait six hours here and he drives, again, all the way over  
23 to Jersey. I think the emergency room note from that is like  
24 1:00 in the afternoon. So he drives through -- over the  
25 bridge, into Manhattan, the cost of the tunnel, to go to

1 Clara Maass.

2 I want to talk about the third C. This is causation,  
3 proximate cause. Sometimes people may say it's approximate but  
4 it's actually proximate cause, close cause, something that is  
5 closely connected with the event. It has to be in a natural  
6 and continuous sequence. This caused that. And you have to  
7 find but for. But for anything that happened at Walmart, he  
8 wouldn't have these conditions on his MRI or anything else like  
9 that.

10 Now, accident causation, plaintiff never really  
11 testified about how he slipped on the plastic. He never looked  
12 down at anything after he fell. Then he's walking around  
13 looking for water? You know, based on the evidence that you  
14 have, how do we know the plastic had anything to do with the  
15 fall? It just was something that was nearby and he fell for  
16 some other reason, told the folks in the emergency room  
17 initially my leg gave out.

18 Then he claims he's walking with dripping chicken. He  
19 came back later and kicked it. We just don't know. And then  
20 the electrical shock. Folks, this is not evidence of someone  
21 for nine or ten years that has had this incident pending, this,  
22 once he was confronted a little bit, it's like a teenage kid, I  
23 wasn't smoking, I wasn't drinking, and you hear the different  
24 stories.

25 Injury causations. Key pictures. The first picture

1 you see the store surveillance video where you see him walking  
2 comfortably around the store.

3 So those are objective. Okay? Nobody can change that  
4 video. Walmart can't go back and say, well, it would be nice  
5 if this wasn't there, Mr. Pataki. You saw that. And the other  
6 part of that thing is you see a gentleman that's walking around  
7 the store, it doesn't look like he's in a lot of discomfort.

8 The second pictures are the X-rays, the MRIs, the CT  
9 scan. That's the only thing objective. Everything else is  
10 what's going on with these doctors and lawyers and courtesy  
11 vans and whatever's happening. Those pictures, surveillance  
12 video, the MRI films, they are not subjective. They are not  
13 dependent upon his say so. They are not credibility dependent.  
14 They are what they are.

15 Dr. Brooks, the neuroradiologist, he explained to you  
16 what all his qualifications are. What he says is, disc bulging  
17 is also part of the wear-and-tear process, degenerative process  
18 of the spine. I know it's not an acute thing, it's not a disc  
19 herniation, it's not a glob of dark -- it is not. That glob of  
20 dark disc material, what's sticking out behind the bones, it'd  
21 be a light color. We saw that in the MRIs because the healthy  
22 discs were like white. It would squeeze out and you get that  
23 white, it would absorb the water, and you would see this area  
24 of white impinging the area, not a black dried-out area.

25 He talks about the bones and he says: Was this caused

1 by the accident? Not at all. This is the wear-and-tear  
2 process of the spine that begins in our teens, continues  
3 through our lifetime. Let's concentrate now on that C5-C6  
4 level where the bone spurs are. This area had been so long, it  
5 started to grow bone spurs.

6 Folks, that MRI center that Dr. Vizzone's partners in,  
7 nobody came in, a radiologist, and said, no, Dr. Brooks is  
8 wrong. Remember, it's great what these orthopedic surgeons  
9 say, but their name doesn't go on the report. Radiologists are  
10 experts in reading these films. You haven't heard anybody who  
11 took the stand for the plaintiff and said, no, no, no, let me  
12 tell you why Dr. Brooks is wrong. Let me tell you, you heard  
13 one radiologist subjected to cross-examination over and over  
14 and over again about what a neurologist does. That's the only  
15 evidence and it was unrebutted. It's nice that Dr. Vizzone  
16 thinks that he can read MRI films as well as a neuro-  
17 radiologist, but that's not the way the medical system works.  
18 Dr. Brooks can't sign an orthopedic report either.

19 Again, I'm sure you remember this, you may have felt  
20 at some point you were in some sort of, like, how to read an  
21 MRI film, where you have these images. He pointed out why  
22 these pictures definitively and objectively showed you  
23 everything that was old and there was no new stuff on top of  
24 the old. Think. You didn't hear anything from anybody else  
25 that said it. Dr. Vizzone candidly said, well, he told me he

1 didn't have pain before so I'm assuming it's related. That's  
2 not evidence. That's entirely credibility dependent.

3 Again, this is Dr. Brooks, he talks about the L5-S1,  
4 which is even more pronounced. That's the flat area, it's  
5 black, degenerative. There is none of that white signal in  
6 there. And you have Dr. DeFalco, there's nothing from this  
7 guy. The MRIs are not causally related. The doctor that does  
8 the Eagles and NFL Combines looked at the MRI films and said  
9 they're not related. He actually, the idea of, like,  
10 controlling his opinion, Dr. DeFalco said, hey, this L4-5, this  
11 looks like at least a herniation but it's degenerative. So  
12 there is that difference. But the guy whose job it is to read  
13 MRI films says the opposite. Dr. Brooks got paid to read the  
14 images. It's not contingent upon what he's doing.

15 Dr. Vizzone on day one had to say the MRI showed new  
16 trauma or he wasn't going to get paid and he sent him to the  
17 MRI center that was related to him. And the same as with the  
18 rest of the team. Again, I might be getting into dead-horse  
19 beating so I want to make sure I move on.

20 The fourth C, comparative negligence, this is the only  
21 burden that Walmart has in the case, the only burden, C. So if  
22 they get past all these hurdles, what I'm going to suggest is  
23 you have to decide if the evidence doesn't show that he gets  
24 over the first hurdle. Then you have comparative negligence  
25 because Mr. Pataki has a duty, too. He has to act like a

1 reasonably prudent customer. And if he claims there was some  
2 piece of plastic that everyone should have seen at Walmart,  
3 then why didn't he see it? He is walking straight for it. And  
4 you have to compare that.

5 There is a fifth C in this case, and that's what we  
6 talk about compensation. This case, the only damages claimed  
7 are what we call compensatory damages. They are limited and  
8 they are based upon what the Court is going to tell you in her  
9 instructions. You can't speculate or guess or add anything  
10 else to it.

11 The fact that there's an instruction on it, the fact  
12 that I reference it doesn't mean you have to get to this point,  
13 but I have to talk to you about the damages in this case  
14 because you heard evidence about it.

15 Mr. Pataki chose not to present certain evidence. He  
16 presented no evidence so that he would have an economic claim  
17 for lost wages. Here's what I was making before, here's my  
18 payroll records, here's what I do. I was making X, Y, Z before  
19 the accident, I'm making X minus Y now. It's the easiest thing  
20 to prove if you allege you can't work. He chose not to do it.  
21 You can't speculate and say, well, I'm going to add this on or  
22 add that on. They chose not to present that evidence to you.  
23 He presented no evidence that anything Walmart did affected his  
24 earnings in the future, where someone came in and said, well,  
25 this is what someone could earn; this is what he could earn in

1 the future.

2 THE COURT: Mr. McDonnell, there is no wage loss  
3 claim. It's irrelevant. Please move on.

4 MR. McDONNELL: Okay.

5 THE COURT: I am just going to instruct you there is  
6 no wage loss claim in this case. I am going to ask counsel to  
7 move on.

8 MR. McDONNELL: Sure.

9 What they are claiming is medical bills past. You  
10 heard about all that treatment. The problem is the only  
11 gentleman that came in was Dr. Vizzone. The amount of medical  
12 bills, admissible amount of medical bills that you can consider  
13 is \$38,500. I'm sorry, there is a typo. That's it. Because  
14 these other people, they didn't come into you, they weren't  
15 subjected to cross-examination to explain why they did or when  
16 they did it. \$38,000, that's the sum total of his economic  
17 claim in this case. Despite all the courtesy vans and driving  
18 back and forth, that's it. That's the most you can give for  
19 medical bills. This is what the team was supposed to prove.  
20 That number should tell you a lot of what the actual value of  
21 those services and surgeries were in the real world. Because  
22 in a real world, you come into court and you have your  
23 schedules and you do it and you explain what you did, why you  
24 did it, and how much the value is. None of that was done. In  
25 fact, Dr. Vizzone really said, you know, I not only can't tell

1 you what my fee schedule is, I can't even tell you what I'm  
2 charging to leave Montclair, New Jersey, drive down here to  
3 Camden and spend a day in the courtroom. I'm not going to tell  
4 you. Oh, in my deposition I said it's \$15,000 a day but I  
5 don't know, as if some office manager or secretary is telling  
6 him what he should charge for a day of his time. You have to  
7 decide is that credible?

8 So this is a case for compensatory damages for  
9 noneconomic damages, in other words, damages that can't be  
10 proven objectively. They have to be proven subjectively.  
11 Damages in a case like this are not based upon the size of  
12 Walmart. You don't get more money if you fall in Walmart than  
13 you fall on your neighbor's step or a little store. You have  
14 to look at Mr. Pataki. And that's why all that stuff who he is  
15 is important because those are the things you evaluate if  
16 you're going to reach the level of compensatory damages.

17 You heard Dr. DeFalco, when he walked into me, I  
18 watched him. How's he walking? How's he ambulating? What I  
19 report, he was ambulating normally. He climbed on and off the  
20 examination table without difficulty. He was alert and  
21 oriented and cooperative. While in the room, he didn't have  
22 any braces, none of that. Dr. DeFalco, the reason he was  
23 chosen was he's an IME doctor. Should I go back to work?  
24 Should I go here, should I go there? NFL, what do you think of  
25 this guy? He evaluated this gentleman by the same standard.

1 He doesn't have an outcome in it. This is what he charges for  
2 anybody that wants his opinion. And, yes, he also appears in  
3 court for his own patients. So when they say 99 percent of an  
4 IME, the plaintiff never asked for an IME. An IME is because  
5 we didn't treat him, we have to go out and find an independent  
6 doctor who can do this examination. Again, when he steps out  
7 of that realm or that team, this is what they see. They don't  
8 see what you saw in the courtroom, a cane or anything else like  
9 that. Then he gives that Jmart apparatus, that's kind of hard  
10 to understand, but it's essentially a tool that's designed to  
11 be objective because it has three different settings. So if  
12 you're kind of faking it, it should be -- the weight should be  
13 certain levels. If you get a score on one side and then you  
14 get a different score on the other, that doesn't make any  
15 sense. You should get the highest score where it's easier to  
16 bow your head, it's supposed to be like right here or they also  
17 make you stretch out. So that's what he was talking about.  
18 It's hard to understand but it's an objective tool that's given  
19 to people to try to see are they really giving the best effort  
20 or are they not giving the best effort. And he failed it.

21 Then he was asked to demonstrate range of motion and  
22 his range of motion didn't make any sense because you know  
23 what? Dr. Vizzone didn't get up here and say he has no range  
24 of motion. He said I did a disc replacement surgery instead of  
25 a fusion so he could have range of motion of his neck.

1                   These are the guidelines. This is why all of that is  
2 so important.

3                   The question is, what a reasonable person -- that term  
4 is all over this case -- would consider to be adequate and just  
5 as to make the plaintiff whole for his injury and consequent  
6 disability and impairment. Folks, the only doctor you heard  
7 from the plaintiff didn't talk about disability and impairment,  
8 didn't tell you he's disabled, didn't really tell you he's  
9 impaired. A person that endures a natural consequence of the  
10 injury. These are the guidelines. These are the factors you  
11 may take into account: Age, usual activities, occupation,  
12 family responsibilities and similar relevant facts in  
13 evaluating the probable consequences of any injury you find he  
14 has suffered. You've been presented with no evidence of any of  
15 that. He told you he weighed 230 pounds before. The ER record  
16 says he's 200. He says 185. He says, okay, I play tennis.  
17 That's the only evidence you have. There is no schedule, there  
18 is no formula. You have to say I know what money's worth. And  
19 based on what he's telling me -- I used to play with my kids, I  
20 used to do this at the thing -- he's given you nothing that he  
21 can make any sort of claim for noneconomic damages other than  
22 he lost some weight since the time. And tennis and biking,  
23 nobody can tell you, yeah, I played tennis with Mr. Pataki,  
24 he's a really good player.

25                   I want to talk briefly about an argument the

1 plaintiff's lawyer is going to make. It's called a time-unit  
2 argument. I call it the rent-a-center argument. You folks  
3 remember they used to have these stores rent-a-centers. They  
4 would operate when people needed furniture, you could go in and  
5 you could rent furniture. And it sounds like a good deal.  
6 Well, look, this is, like, you know, this couch is only \$3 a  
7 week. \$3 a week for a nice couch. All of a sudden you add it  
8 up and it's not just \$3 a week. I don't want to age myself but  
9 when I was in college, people didn't have color TVs in their  
10 room. Now they have computers and things like that. So every  
11 year on campus they would say, if you want to rent a color TV,  
12 you can watch all the football games and basketball games and  
13 you have a color TV in your room. There was always a come-on,  
14 it's like a dollar a day, you and your roommates, \$2 a day.  
15 And if you're paying for your TV per day, it's \$50 used TV,  
16 you're paying \$2 a day, by the time you're done, you've paid  
17 for that television five or six times. Or the car salesman  
18 says to you, well, I'm not okay with the price of the car, how  
19 much can you afford a month or a day or anything else like  
20 that. That's what Mr. Jean is going to do. Mr. Pataki here is  
21 not seeking a dollar a week or a dollar an hour or anything  
22 like that. He's seeking a lump sum payment. You know the  
23 value of getting your money up front. You buy a house, you  
24 know the price of the house, but it takes you years to pay it  
25 off over time. In this case, he's not asking for all those

1 payments. He's saying, I want a lump sum payment. And, again,  
2 you know what things cost. And plaintiff's attorney is going  
3 to come up to you and suggest to you, well, now, this is what  
4 it is. He's permitted to do it. Just because lawyers are  
5 allowed to do something doesn't mean that it's anything other  
6 than argument.

7 So what is it? Here's the pitch: His life expectancy  
8 is 33.2 years. By the way, Dr. Vizzone didn't testify that he  
9 is going to have problems for 33.2 years. He didn't say it.  
10 In fact, he didn't say he needed a cane. You take that figure,  
11 you multiply it by 365, the days in a year, and divide by 24  
12 hours a day. Sometimes they give it a per diem, but if you  
13 really want to push it, you go per hour. And that gives the  
14 total hours for his life expectancy 290,832 hours. And then  
15 what a lot of lawyers do, I don't know, I get to stand up after  
16 him, what they do is, hey, I'm being reasonable. You spend a  
17 third of your time asleep. Well, let's deduct that. So I'm  
18 only seeking compensation for 191,000 hours. Then he'll say,  
19 what's a fair figure per hour. Again, he's not asking for  
20 something for the hour. I have a time-unit argument. Folks  
21 work every day. They leave their home, they leave their  
22 family, they commute, and at the end of the week, at the end of  
23 the year, what do you have left over for working 2000 some  
24 hours a year? He wants that lump sum. The other thing the  
25 Court's going to tell you, this personal injury money, it's

1 tax-free. So you can't consider any sort of taxes or add  
2 anything else like that or any expenses. It's all about this  
3 charge. This lawyer is going to try to convince you that  
4 somehow you should attribute money based upon the hour. When  
5 you go to buy a house or something kind of like, again, a  
6 permanent thing, can you imagine if the real estate realtor  
7 said to you, well, I'm going to tell you the price of the  
8 house. How many hours are you going to spend in this house?  
9 What's a fair amount of money are you going to spend per hour  
10 to live in this house? People would walk away from that, say  
11 that's absurd. What's the value of the house? In this case,  
12 that's what he's asking for, the lump sum up front. Then what  
13 happens in an hour? Suppose you have a good hour or bad hour?  
14 How could you possibly weigh this?

15 Folks, I'm asking you to ignore a gimmicky argument  
16 and listen to what the Court's going to tell you. Consider  
17 those factors, his lifestyle, his occupation, his age, his  
18 family responsibilities, and he hasn't told you any of that.  
19 No amount of like fuzzy math changes this case.

20 I'm asking you please to follow the law the judge  
21 gives you, use your sound judgment, without sympathy and  
22 prejudice like you swore your oath to do. You don't even have  
23 any evidence of what he does for a single hour today. He  
24 hasn't told you. I think he might have made mention he watches  
25 television and plays video games. He doesn't tell you, I wake

1 up in the morning, I have to do this, I have to do that, I do  
2 my chores, none of that evidence. Folks, that was his only  
3 claim for noneconomic damages. He didn't say anything other  
4 than that.

5 Final thing, and this is where I am going to sit down  
6 soon, plaintiff gets the last word. So I can't stand up  
7 afterwards and say, hold on a second, that didn't happen. So  
8 I'm asking you to consider these things as you hear the  
9 plaintiff's argument. Walmart's only burden here was  
10 comparative negligence. That's it. What sometimes you hear  
11 from plaintiffs' lawyers, well, why didn't Walmart call the  
12 manager, why didn't Walmart call this person, why didn't  
13 Walmart call that person? The reason is because it's the  
14 plaintiff's burden to show negligence. They can subpoena him,  
15 they can depose him. So if you hear that kind of stuff, what  
16 they're saying is I haven't met my burden of proof. I don't  
17 want you to consider evidence outside the courtroom. I don't  
18 want you to speculate about what somebody said. You swore on  
19 your oath you wouldn't do that. I expect you and I fully am  
20 confident you will follow that oath. Every time hear, like,  
21 oh, what about this, why didn't they show more video, why  
22 didn't they show this, all that's speculation. If there was  
23 missing video or a missing witness or somebody that wasn't  
24 there, you would be told about it, there'd be evidence of that  
25 and there would be rules to follow so you can make that

1 argument. And there would be instruction that says, hey, this  
2 was asked for, it wasn't turned over, they hid it, they  
3 destroyed it, they could have gotten camera diagrams if they  
4 thought there was more video, they could have talked to our AP  
5 people and say why is this camera so fuzzy. None of that. So  
6 if he stands up here without hearing any evidence in the  
7 courtroom and says what about this that isn't here, what about  
8 this that isn't here, what he's saying is I can't meet my  
9 burden of proof. Payroll records, anything, folks, Walmart is  
10 an open book. Everything we do is documented. Nobody works  
11 ten minutes there without it being on a time card. You didn't  
12 hear any evidence of it. Walmart does not have any obligation  
13 to present any evidence other than, how does a reasonable  
14 customer walk in the aisle and what do they see? That's the  
15 case. That's the only thing we have. And I take that burden  
16 seriously in the same way I expect you to take the burden,  
17 which is the plaintiff hasn't proven their case. We are not  
18 going to try to disprove something that hasn't been proven. We  
19 presented medical witnesses because they presented Dr. Vizzone.  
20 I assumed they were going to present a doctor who was going to  
21 say, oh, I read the films and this is what they said. So we  
22 were prepared to present medical evidence of that. And that's  
23 not something that generally Walmart could do without going out  
24 and getting specialized people to do it. But in this case  
25 plaintiff did not prove that there was an unreasonable risk of

1 harm, it was there long enough that a reasonable employee would  
2 have seen it and picked it up.

3 Here's the verdict. Remember I said there's a test  
4 and there's questions? This is what it is:

5 Question 1: Do you find the Plaintiff Peter Pataki  
6 has proven by a preponderance of the evidence that Walmart was  
7 negligent on June 7, 2015? That's care, that's the first C.

8 Second C: Do you find that plaintiff has proven that  
9 Walmart's negligence was a proximate cause? The Court's going  
10 to give you an instruction, you have the evidence, you can't  
11 speculate about what you don't have, and you have to follow  
12 your oath.

13 In this case, despite ten years, the plaintiff hasn't  
14 even told you what it is or took a cell phone picture or at  
15 least even describe it, or why was it slippery, what's the  
16 floor like? There's been no expert to say I tested the floor,  
17 I tested the different types of plastic, this is what I think  
18 it was. There's no evidence of any writing or the plastic or  
19 what it even was. If you've got to speculate, the only answer  
20 is to say the party with the burden of proof hasn't met it and  
21 you check no.

22 The next is, this is the burden, you see the way it's  
23 written: Did Walmart prove that Plaintiff Peter Pataki was  
24 negligent? That's the only burden on this case.

25 Do you find that it was a proximate cause, the second

1 C? So these two C's, care and causation, are applicable to  
2 both parties.

3 Then you have that other C, comparative, that's where  
4 you weigh.

5 And the last damage is, these are the only damages you  
6 can consider, noneconomic damages and past medicals. You can't  
7 speculate about anything else. Something you heard in another  
8 case, well, I heard somebody did this and did this, you have to  
9 focus on the facts in this case, the evidence in this case and  
10 the instructions the Court gives you. There's nothing else to  
11 be added if you don't have an instruction for it. I don't like  
12 what Walmart did here, I want to add some more. That's not in  
13 the case. I like this lawyer, I don't like this lawyer, I want  
14 to add this. This case is about what's on the test and the  
15 instructions the Court is going to give you. We are confident,  
16 after paying the type of attention you did, particularly to  
17 neuroradiology, it's not a subject you took in junior high,  
18 that you will reach a fair verdict consistent with the evidence  
19 and the instructions that the Court will give you.

20 Thank you very much.

21 THE COURT: Okay. Thank you, Counsel.

22 Ladies and gentlemen, we are going to take a quick  
23 ten, 15-minute break. It's our normal morning break time.  
24 When we come back, you will hear closing argument from the  
25 plaintiff and then I will give you the instructions and you

1 will start to deliberate. Okay?

2 Please don't talk about the case amongst yourselves or  
3 anyone else. We are at a critical point in the case. You have  
4 only heard one of the closing arguments and I want to make sure  
5 you keep an open mind until you hear everything and I give you  
6 the instructions. Okay?

7 THE COURTROOM DEPUTY: All rise.

8 (The jury leaves the courtroom at 11:38 a.m.)

9 THE COURT: Please be seated.

10 Mr. McDonnell, I interrupted you because I think you  
11 became dangerously close to asking this jury to speculate about  
12 why there is no wage loss claim. There is no wage loss claim.  
13 I think it's entirely inappropriate to suggest why don't we  
14 know how much he was working. I think those questions about  
15 what he was doing are fine. When you, in my opinion, sort of  
16 crossed the line, which prompted me to stop you, is when you  
17 said, well, what was he making before and what's he making now.  
18 We all know why we don't know that information because he is  
19 not legally permitted to work here. So I wanted to stop you  
20 before you went what I thought was too far. And I am going to  
21 tell them again when I read the damages instruction that there  
22 is no wage loss claim and they should not consider that or  
23 those comments in any way. I think that that's a sufficient  
24 curative instruction for what I thought was becoming very close  
25 to being inappropriate, which is why I stopped you.

1 MR. McDONNELL: Your Honor, my concern though is if  
2 the jury doesn't hear it, they think, well, how do we do lost  
3 wages because it says occupation, but I understand what you --

4 THE COURT: Well, then you could have asked me to  
5 remove the reference to occupation in that, but I think it  
6 makes sense here because you are talking about him having  
7 allegedly done heavy work or not, number one. You could have  
8 asked me to qualify it or change the language or add a  
9 statement that there is no claim for lost wages here. So I  
10 wish you would have addressed it earlier. Nevertheless, I sort  
11 of stopped it as soon as I saw where I thought you were going  
12 and I think I gave an instruction at the time that was  
13 sufficient and I will give it again --

14 MR. McDONNELL: I understand, Your Honor.

15 THE COURT: -- when I give the final instruction.

16 Anything else, Mr. Jean?

17 MR. JEAN: Your Honor, I share Your Honor's  
18 observations. I do not like objecting during closing  
19 statements. Mr. McDonnell is doing his job but I just ask that  
20 I be given -- and I will not cross any line -- just given a  
21 full and fair opportunity to rebut. I did not want to  
22 interrupt his flow. He was doing his thing. Can I just be  
23 allowed to be given the leeway to give a response?

24 THE COURT: I think that's fair. Do you have any  
25 objection to me giving the curative instruction again when I do

1 the --

2 MR. JEAN: No, no.

3 THE COURT: What I think is fair is you may comment  
4 that -- I am going to tell them that they should disregard any  
5 comments about what his wages were or what they are because  
6 that's not part of this case. There is no claim for lost wages  
7 and, you know, the defendant's argument as to what he did and  
8 how that affected whether this was traumatic or chronic is a  
9 valid argument. When I heard the word "wages" and "what he  
10 made or didn't make" that's why I stopped him. So I agree that  
11 you should be able to say that and I see nothing wrong with  
12 that.

13 Do you have any objection to that, Mr. McDonnell.

14 MR. McDONNELL: No, Your Honor, as long as it doesn't  
15 seem punitive or I did anything wrong because I don't think I  
16 crossed the line.

17 THE COURT: No. That's why I think it's fair to let  
18 Mr. Jean address it and indicate that's why you didn't hear any  
19 of that information. He can say the Court doesn't allow us to  
20 put on information that's not relevant.

21 Again, I stopped you because I didn't want to have a  
22 situation where then I have a request for a mistrial.

23 MR. McDONNELL: I understand, Your Honor.

24 THE COURT: And I thought that that was the  
25 appropriate place to stop you. And, yes, counsel is often

1 reluctant to object during closings but I think it's part of my  
2 job to make sure that they don't hear something they shouldn't  
3 hear. And I will not make it punitive. So the fact that he  
4 addresses it as well will make it balanced and I will address  
5 it in the final charge just as a matter of course.

6 MR. McDONNELL: I understand, Your Honor.

7 THE COURT: Obviously, it's not going to be written in  
8 there because I am going to do it on the fly.

9 Do we have the final copies? We will bring them down.  
10 As soon as he is done, we will pass out, unless they need a  
11 break, the verdict sheet and the jury instructions and I will  
12 give the charge.

13 I will be back in ten minutes.

14 THE COURTROOM DEPUTY: All rise.

15 (Brief recess taken from 11:42 a.m. until 12:01 p.m.)

16 THE COURTROOM DEPUTY: All rise.

17 THE COURT: Please be seated.

18 Mr. Jean, do you know how long you are going to be?  
19 Just approximately.

20 MR. JEAN: Less than an hour.

21 THE COURT: Okay. So then that should work. I will  
22 have to ask them if they want to take their lunch break before  
23 I charge. It will be 1:00 at that point. My guess is they are  
24 going to say no. I read pretty fast. It will probably take me  
25 20, 30 minutes to do the charge. Okay?

1 All right, bring the jury in.

2 THE COURTROOM DEPUTY: All rise.

3 (The jury enters the courtroom at 12:02 p.m.)

4 THE COURT: Please be seated.

5 We are going to conclude the lawyers' part of the case  
6 with the closing argument of plaintiff's counsel, after which,  
7 we are running a little bit behind, but I will give you the  
8 option of having me go right in and charge you, which I think  
9 will take about 20, 25 minutes and go over the verdict sheet  
10 and you can then go back and deliberate, have your lunch, or if  
11 you want to take a lunch break and come back and have me charge  
12 you. So you can think about that. When he is done, we will  
13 see what time it is, and I will ask you what the group would  
14 like to do. Okay?

15 Mr. Jean.

16 MR. JEAN: Thank you very much, Your Honor. May it  
17 please the Court.

18 THE COURT: Do you want the lights dimmed? Are you  
19 showing something or are you okay? Let Ms. Minix know if you  
20 need it done.

21 MR. JEAN: I appreciate the Court's assistance. I  
22 don't want to make them my staff.

23 THE COURT: Okay.

24 MR. JEAN: If everyone is ready to proceed, I am.

25 (CLOSING ARGUMENT BY MR. JEAN)

1 MR. JEAN: May it please the Court. Counsel,  
2 Your Honor, members of the jury, good morning again.

3 Before I begin in the argument, this is the closing  
4 argument section, the judge will instruct you that what I do is  
5 argument, as a lawyer. I put an S on my chest, I try, and I  
6 try to advocate for my client. So it is argument. But what's  
7 most important is the common sense that you bring to this  
8 courtroom. But before I get to that, I know this has been some  
9 time out of your busy schedules, you have families, you have  
10 work, you have things to do, but in our system of justice, and  
11 I love when I come into federal court and I see the seal  
12 because this is -- I am kind of corny with that -- this is the  
13 arbiter. This is how a civilized society finds resolution when  
14 we have disputes. We don't duke it out. We duke it out with  
15 lawyers. We use some fancy words. I'm going to try not to use  
16 fancy words because fancy words are not what this case  
17 requires. Number one, thank you for your service and thank you  
18 for your time.

19 What is this case about? It's been ten years,  
20 approximately, June 7th of 2015. What is this case about?

21 Members of the jury, the evidence and the facts that  
22 you have heard over the past few days is a story of Mr. Peter  
23 Pataki, a real-life David versus Defendant Goliath, Walmart.  
24 And I use that to illustrate a point that we have seen over and  
25 over and over again.

1 I sat through Mr. McDonnell's closing statement. I  
2 listened and I feverishly wrote down notes so I wouldn't forget  
3 the things that I would like to impress upon you. And I speak  
4 slowly intentionally because my heart races when there's things  
5 I am in disagreement with. But, essentially, what we heard  
6 here today, we heard blame the victim. That's what we heard.  
7 We heard blame the victim for having a lawyer with the S on his  
8 chest who stands before the jury and gives fancy words, who  
9 speaks the King's English to explain the indignity that has  
10 occurred here for the past ten years, approximately ten years.  
11 Blame the victim.

12 I am going to attempt, to the best of my ability, to  
13 keep this simple. Why do I say David versus Goliath?

14 Well, members of the jury, you're wondering what are  
15 you going to do next. The judge will instruct you as to what  
16 you are going to do next. I am not going to use fancy charts  
17 about the theories. I am going to get straight to this case.  
18 This case is simple. The judge will instruct you at the  
19 conclusion of the trial. You are going to get a jury verdict  
20 form. You're going to get a jury verdict form which will be  
21 the end of this approximately ten-year battle with David and  
22 Goliath.

23 The first question will be: Do you find that  
24 Plaintiff Peter Pataki has proven by a preponderance of the  
25 evidence that the Defendant Walmart, all 50 states, also out of

1 this country, that the defendant was negligent on June 7, 2015?  
2 I wrote in my notes, I checked off -- you are going to do  
3 whatever you are going to do, but in my notes I said yes. I am  
4 going to tell you why.

5 If your answer to the question is no, then do not go  
6 any further. But if your answer is yes, proceed to Question 2.  
7 I submit that you are going to go to Number 2. What does  
8 Number 2 say? It says: Do you find that Plaintiff Peter  
9 Pataki has proven by a preponderance of the evidence that  
10 Walmart's negligence, which we are going to prove or we have  
11 proven already, was a proximate cause of the harm? I checked  
12 off yes. That's what I did. You do what is in your definition  
13 of common sense.

14 If your answer is yes, proceed to Question 3. Do you  
15 find that Defendant Walmart has proven by a preponderance of  
16 the evidence that Peter Pataki was negligent? I said no, but I  
17 submit you are going to go to Number 3 and answer no.

18 Question 4: Do you find that Walmart has proven by a  
19 preponderance of the evidence that Peter Pataki's negligence  
20 was a proximate cause of the harm? I wrote no. They haven't  
21 done that.

22 Question Number 5: Taking the combined negligence  
23 that was a proximate cause of any harm to the plaintiff as 100  
24 percent, what percentage of causal negligence was attributable  
25 to each of the parties that you found causally negligent?

1 That's going to be the jury charge that you read. I wrote, my  
2 argument, I wrote a hundred percent Walmart. But you are going  
3 to do what your common sense dictates.

4 Question Number 6: State the amount of damages, if  
5 any, that would reasonably and fairly compensate Peter Pataki  
6 for any injuries you find were proximately caused by the  
7 incident.

8 The first question is pain, suffering, disability,  
9 impairment, loss of enjoyment of life, and then next to it  
10 there is a dollar sign, and then you will use your common sense  
11 to figure it out.

12 Past medical expenses, the judge will instruct you  
13 upon a stipulation, this is a dollar sign, you will fill it in  
14 yourselves. You have tremendous power.

15 Then third, future medical expenses, that's what it  
16 says on the jury verdict form.

17 Well, let's go through the story.

18 What did we hear? Why do I say this is David versus  
19 Goliath? Because, members of the jury, when you woke up this  
20 morning with something that you've been blessed with, it's been  
21 nurtured and as you've aged, it's gotten better like wine, it's  
22 common sense. It's nothing fancy. It's the decision whether  
23 or not I should walk down a particular place at a particular  
24 time in a particular place in the country. It's the decision  
25 whether or not I should choose this college or that college.

1 It's the decision whether I should take this job or that job.  
2 It's your common sense, it's the thing. Common sense is genius  
3 and you have genius. It's the ability to make that decision.  
4 And I am going to show you through your common sense why the  
5 verdict form should be filled out in the way that I did.

6 What evidence did we hear in this case? Not fancy  
7 charts. Let's talk about what we heard. What evidence did we  
8 show?

9 I remember when I was in grade school there was a  
10 teacher that always used to say show me your work. Show me  
11 your work. Don't just give me your answer because I don't know  
12 how you got the answer, show me your work. So I gave an  
13 argument but I want you to question me. Whenever I say  
14 something, ask yourself, why is Mr. Jean saying that? Is he  
15 showing you the work? How does one plus one equal two? Force  
16 me to show my work. We have shown our work.

17 First thing that we did in this case, first evidence,  
18 this is a little grainy, you will have your iPads, but for  
19 demonstrative purposes, indulge me.

20 June 7, 2015, it's a Sunday. Use your common sense.  
21 What do people do Sunday evening at approximately 8:00:35?  
22 What's happening? That's significant. Why is that  
23 significant? 8:00, P-43A, right, this, what I'm showing you,  
24 is exactly the same thing, just for your illustrative purposes.  
25 There's a thing. Momma's common sense. There's a thing.

1 You'll make the determination what that thing is. But there's  
2 a thing in P-43A, it's also on this more grainy image but  
3 you'll have your iPads, it will be in crisp resolution.

4 P-43B, 50 seconds. P-43C, P-43C, this is where we  
5 are. P-43C. What's significant about P-43C? 8:00, 8:04:41.  
6 We have 8:00:35. Let's go to the videotape. You will have an  
7 opportunity to see a better image in your iPads but I'm going  
8 to go to P-43C. What is that? Why is that significant? Has  
9 Mr. Jean shown his work? Force him to show his work. Force me  
10 to show my work.

11 (Video played.)

12 MR. JEAN: 8:04:41. We talked about credibility, we  
13 talked about common sense. Please bear with me. The reason I  
14 take my time is because Peter has been waiting for ten years  
15 and that's why I thank you. Just indulge me.

16 P-43C. Common sense, credibility. 8:04:41, what do  
17 you see? Credibility, consistency, common sense. What do we  
18 see? Is Mr. Jean showing you his work? And I'm not going to  
19 use the language beating the horse because I don't like that,  
20 it's just beating whatever that was, that was just -- it's not  
21 language I choose to use.

22 Who are these people? What are they carrying?  
23 Credibility, consistency, common sense. What are they  
24 carrying? They have garbage bags. The common sense that we  
25 all woke up with in the morning. What is the purpose of

1 garbage bags? What duty does Walmart, with its tremendous  
2 amount of employees and resources, what duty do they have to  
3 individuals like Mr. Peter Pataki who walks into a Walmart  
4 store to get some chicken? Bombarded by signs of 99 cents  
5 here, buy this, buy that. What duty does Walmart have? Use  
6 your common sense. Who are these individuals? What do they  
7 do? It's rhetorical, of course. We know what they do. You'll  
8 have an opportunity to use your iPads, you'll have crisp  
9 versions of what's going on up here. I didn't dim the lights  
10 because I don't want to go back and forth but there's a thing  
11 right there. You're going to see it. You're going to see it.  
12 You're going to see it on your iPads. Do not let Walmart tell  
13 you do not trust your eyes. You saw what you saw. Don't let a  
14 corporation tell you you didn't see what you saw. You saw what  
15 you saw.

16 Mrs. Gardner told you what she saw. Did she speak the  
17 perfect King's English? No. Did she tell you what she saw?  
18 She says she was in the meat department. To use her language,  
19 "I was in the meats." They tried to -- you saw how they  
20 handled her. She wasn't getting paid to be here. She was on  
21 her phone at home doing whatever she was doing to mind her  
22 business. She volunteered because our office sent her a letter  
23 and we said, Mrs. Gardner, we'd like to know what you know.  
24 Please tell us what you know. My direct examination was short.  
25 What happened? Who are you? Shabazz High School, born in

1 Orange, you know. She wasn't -- candidly, she wasn't in a  
2 suit. She was just home minding her business. She told you  
3 the truth. Judge her credibility. You're going to see her in  
4 this video.

5 But I pause here at 8:04:39 because we know -- what do  
6 we know? We know that Peter Pataki is going to fall here at  
7 8:06:33. Why? I have watched this video many, many times,  
8 many, many times, trying to make it make sense to me. Walmart,  
9 please, make it make sense to us. What duty do you have? Who  
10 are these individuals? Well, these individuals, we're going to  
11 see what they are going to be doing.

12 Let's go to the videotape, if you will.

13 (Video played.)

14 MR. JEAN: They got garbage cans. We got this thing  
15 over here, the thing that's going to cause Mr. Pataki to fall.  
16 They have clear opportunity, clear opportunity, clear  
17 opportunity. Granted, this is a grainy video. The one that  
18 you're going to see on your iPad is even better. Let me see if  
19 my image here is even better.

20 P-43D, 8:04:51, 8:04:52, credibility, consistency,  
21 common sense. Credibility, consistency, common sense. And if  
22 anything I say differs from what your recollection is, forget  
23 what I say. What did you recall? What did you recall? Let's  
24 not twist things.

25 Where did they go? Where did they go? What's their

1 duty? I'm going to pause for a moment.

2 Mr. McDonnell mentioned it, I didn't. He talked about  
3 we had a Walmart manager. The Walmart manager didn't testify,  
4 did he? I'm sure that Walmart manager was responsible to know  
5 what these individuals are supposed to do. He could have told  
6 us what they do. But do we really need them to tell us what  
7 individuals with garbage bags walking through a store, what's  
8 their responsibility? I'm going to tell you what their  
9 responsibility was because at this point it's sounding so  
10 ridiculous. Their responsibility, members of the jury, is to  
11 clean. It's an honorable profession. You sign up to make sure  
12 that the area is safe for customers. That's their job. It's  
13 an honorable job. But if you're going to assume the  
14 responsibility for a job, you need to do it reasonably, you  
15 need to do it carefully. That's what you're supposed to do.  
16 It's not complicated with fancy charts. You're just supposed  
17 to do your job. Everyone has a job. You have one job,  
18 respectfully, it's an honorable job, but you should do it. And  
19 if you don't do the thing, don't tell us that we didn't see  
20 what we saw. It is insulting. It's diabolical. You blame  
21 Peter Pataki when -- did Mr. McDonnell spend a moment, a  
22 moment, to talk about these individuals? And I state here --  
23 and I am not using that language that he chose to use -- who  
24 are these people? What's their responsibility? Their  
25 responsibility is to pick up trash. We have trash. Why do we

1 know that? We know because Mrs. Gardner tells you. She told  
2 you that she saw Mr. Pataki's feet get caught up in plastic.  
3 She told you. Did you find her credible? I submit that you  
4 will find her credible with her simple words. She was "in the  
5 meats." That's her language. This is the meat department. "I  
6 saw what I saw, Mr. McDonnell. You're not gonna try to twist  
7 my words, Mr. McDonnell. I'm here on my own time. I'm not  
8 getting paid for this." Yes, she was a little sassy, she was.  
9 But she's home, she's trying to give the truth. She has no  
10 vested interest in this case. She doesn't know Mr. Pataki.  
11 There's no relationship. They're not going to the club  
12 together. They're not going to some social club together.  
13 Their worlds could not be further apart. Mr. Pataki, who lives  
14 in Brooklyn, who happens to go to Pathmark, and Mr. McDonnell  
15 wants to know why are you in Pathmark -- I apologize --  
16 Walmart, Walmart, why are you in Walmart? I'm here to shop.  
17 I'm here to catch the deals. I'm here to be among the meats,  
18 that's why I'm here. This is ridiculous. They blame the  
19 victim.

20 8:04:52. Why is that important? That's important  
21 because when you read the jury charge, and the judge instructs  
22 you upon the law as to what is -- how do we prove negligence?  
23 We prove negligence when we have actual or constructive notice.  
24 Actual or constructive notice. What does that mean? Actual  
25 notice means I saw it. I saw it. Members of the jury, you see

1 it. You see it. You see it.

2 I apologize for being a bit amped this morning but  
3 this has been ten years, ten years, and all we had to do was  
4 use some common sense but we deflect, we deny, we twist things,  
5 we make -- we try to tell people they didn't see what they saw.  
6 It's ridiculous. And we have members of the jury who are  
7 sitting here patiently listening to this, but it's important to  
8 us. It's important to Mr. Peter Pataki who sits here. Common  
9 sense, members of the jury, I know, I know, I know, I keep  
10 talking about the same point. It's 8:04:52, they have a  
11 responsibility and they failed in their responsibility. They  
12 had a job, they had a job, but do they do their job? No. You  
13 are going to see it on the iPads, there is going to be a clear  
14 view, but they leave the area, they leave the area. They don't  
15 come back. What did we just prove?

16 Mr. McDonnell had a thing, a refrain. They've got  
17 nothing. They've got nothing. Well, we have a lot of  
18 something. We have what we call in the law actual notice,  
19 actual notice. And in the event, there's -- I know I'm a  
20 little dogmatic, but I'll leave a little room for some -- I'll  
21 leave a little room for an alternative position but I do think  
22 that we have actual notice here. They ignored it. They saw  
23 it, they ignored it. Or constructive notice, the judge will  
24 instruct you what constructive notice means. I submit to you  
25 both actual and constructive notice has been proven. They had

1 a full and fair opportunity to see the thing that would cause  
2 Mr. Pataki to fall and they ignored it.

3 So when they walk -- when Walmart comes and tells us  
4 we don't see what we see, members of the jury, you saw it with  
5 your own eyes. That's important because that's -- the reason I  
6 spend so much time on this, it's fundamental to what you do  
7 later on. It really is. It really is. I'm amped about it but  
8 it's common sense. You're going to see on your iPads. They  
9 saw it, they ignored it. They breached the standard of care.

10 We're going to move to 8:06. What's important about  
11 8:05, the thing is there, they had an opportunity. They failed  
12 in their duty and disregarded it.

13 Let's continue to look at the tape.

14 (Video played.)

15 MR. JEAN: You're going to see on your iPads, this,  
16 it's not a glare. It's a piece of plastic. You're going to  
17 see Mr. Pataki come into our screen.

18 We're going to go to 8:06. 8:06. Members of the  
19 jury, we're still talking about liability. We're going to talk  
20 about damages in a moment, but we must talk about liability,  
21 got to talk about it. 8:06. I had 8:06 in P-43 only because  
22 when you open your iPads you're going to clearly see, you're  
23 going to clearly see plastic on the ground. Very simple. It's  
24 been ten years but for some reason we have been unable to see  
25 what I believe that you have to see. 8:06:23, 8:06:23, my

1 photo is a little better than this image but you'll have your  
2 iPads. The reason I walk through this timeline very carefully,  
3 it's very important. It's very important because we know  
4 what's going to happen.

5 I am going to go to 8:06:28. 8:06:28. 8:06:28, you  
6 are going to see Mr. Pataki. I am going to pause here,  
7 8:06:26, 27, boom. Hold on. Okay.

8 So what does Walmart do? Walmart advertises to people  
9 in big signs, 98 cents here, 2.89 here, 1.89 here. What are  
10 most people doing when they go shopping? They're counting  
11 their coins. They're getting ready for Sunday dinner, buying  
12 chicken.

13 What did Mr. Pataki tell us? He was buying chicken.  
14 He's a simple man. He has chicken in his hands. Well, what's  
15 interesting is that Walmart has the audacity to say, well,  
16 you're responsible, Peter. We have no duty. We don't have to  
17 prove anything here. We don't have to put any witnesses on, we  
18 don't have to prove anything, we don't have to have incident  
19 reports. We're just going to sit here and let you prove your  
20 case. Well, that's why you have a lawyer. Hopefully, I can do  
21 a good job to represent my client. But when you take on  
22 Goliath, you need a lawyer. You need someone to speak the  
23 King's English, to take the little pieces of the puzzle and put  
24 it together so we can be in federal court so that we can answer  
25 something which is so clear but they deny and they deflect.

1                   8:06:28, Mr. Peter Pataki, his life is going to  
2 change. They want to blame him for it. Interesting argument.  
3 Mr. Pataki, you are responsible, too. It's like two kids who  
4 are arguing: Mom: What happened? Dad: Well, he hit me. He  
5 hit me, too. Really? Is that what we're doing? So what I  
6 heard you say is that you hit your sister. Yeah, but he hit  
7 me, too. Okay. So you admit that you hit your sister, yes?  
8 Oh, well, yeah.

9                   Walmart, you admit that the people that we saw go  
10 through the area failed to pick up the plastic, which was their  
11 job. You admit that that's what they were supposed to do. You  
12 admit that you had actual notice, constructive notice, you  
13 admit that. You admit that you were negligent.

14                   We stepped on a cord. Did we go out? My laptop. We  
15 are back up. Thank you, sir.

16                   8:06:28, boom. You just saw it with your own eyes.  
17 Mr. McDonnell didn't spend any time denying that Mr. Pataki  
18 fell. He fell hard. You saw it with your own eyes. Walmart,  
19 despite their fancy words, cannot deny it. It is a fact. It  
20 is true. There's no alternative ways of looking at it. The  
21 man fell. We had a dispute as to whether or not he was 200  
22 pounds, 230 pounds, people fluctuate in weight, but what we  
23 know is at least 200 pounds, six-foot-three of man, big man,  
24 big burly man, over 200 pounds, bam, on the ground. Do you  
25 think that felt good? Credibility, consistency, common sense.

1 I am not trying to -- we talked about -- what was the word that  
2 Mr. McDonnell used -- a ring? I don't even know what that is  
3 but -- I don't know what that is. I don't know what that is,  
4 but what I do know is facts. 200 pounds, let's give him 200  
5 pounds, smashing down on the ground. Do you think it tickled?  
6 Did it feel good? Does that meet your definition of common  
7 sense? No, it doesn't. And then now Goliath wants to say,  
8 well, what's the proper way of behaving after you are walking  
9 in Walmart in the meats department and you fall? What's the  
10 proper way? What's the proper way to react? Is there some  
11 textbook way of how a human being who is trying to count his  
12 coins to get some chicken, is there a standard way for them to  
13 behave? You fault him for going -- and, candidly, he's on the  
14 stand, he's trying to explain this, make sense. It's been ten  
15 years. He's trying to explain, he does go back into the meat  
16 department. He's, like, walking around, he's kind of, like,  
17 with the phone, what happened to me? I was a healthy person.  
18 I just fell. Now they want to blame him. You didn't act in an  
19 appropriate way. He goes back to the scene, he tries to figure  
20 out what happened.

21 Mrs. Gardner, this is Mrs. Gardner. This is Mrs.  
22 Gardner. 8:06:34, she saw him fall.

23 Now I am going to take a moment, consistent with this  
24 way of treating people, it's been consistent, the past ten  
25 years, even in this courtroom. They manhandled Mrs. Gardner

1 who was just telling you what she saw. She saw him. What did  
2 she say? Use your recollection, not mine. She said something  
3 to the effect of, he fell and fell hard. His feet went up. It  
4 hurt me. It was -- it was -- she told you it was hard. But  
5 why am I still on this point? I'm like on the point. And I  
6 hope -- you're probably wondering, why is Mr. Jean just telling  
7 us over and over, it's just common sense? Because it's been  
8 ten years and we're in federal court and we're trying to make  
9 it make sense. So I'm here trying to make it make sense. It's  
10 so obvious. The man falls. It hurts. It didn't tickle. He  
11 falls. He gets right back up. Why? Because at that point  
12 Mr. Pataki had never -- let's take a moment here. Let's take a  
13 moment and breathe, just breathe.

14 According to Walmart, according to Walmart,  
15 Mr. Pataki, who was, what, 39 or so, use your recollection, was  
16 some unhealthy man with a degenerative spine. He told you why  
17 he was able to pop right back up. He told you. He goes to  
18 Easton Parkway, he rides his bike, he believes in stretching.  
19 He has good physical fitness. Of course, that tells you  
20 something. What does it tell you? That tells you what his  
21 life was like, that he can suffer slamming down on the ground  
22 and get back up. That was what he was used to. That is his  
23 instinct. That is how he lives.

24 The ring that Mr. McDonnell -- I don't even know what  
25 that means. What does that mean, a ring? A ring? It's not a

1 ring. I don't know what that is. I think I know what he's  
2 trying to say but I'm not even gonna go there.

3 He falls. It hurts. The fact that he gets up tells  
4 us a lot about his credibility, that he was indeed a virile  
5 man, that he was indeed a strong man. He was a man -- and I'm  
6 going to take a moment. I'm watching a sign. When you go to  
7 lunch, you're going to see a sign by the elevator. The sign  
8 says something to the fact of be healthy, be happy, take the  
9 steps, something like that. I guess it's encouraging physical  
10 fitness. Maybe you saw it, maybe you didn't. When you leave  
11 the courtroom for lunch, you'll have an opportunity to see it.

12 Well, Mr. Pataki, before June 7, 2015, would have done  
13 that. He was a virile man. He was a man that could pop up  
14 after he falls down. He would have taken the steps if he  
15 wasn't here in federal court for whatever reason. He would  
16 have taken the steps. You saw him. He uses a cane and they  
17 mock him. They mock him.

18 The man walks with a cane. The man has a spine fused  
19 and they mock him. You know how else they mock him? Did your  
20 girlfriend -- didn't you have a girlfriend? You had a  
21 girlfriend, didn't you? Again, consistent with the fact that  
22 he was indeed a virile man. He was a man. Walmart took his  
23 manhood away, they did. Didn't your lady take you backwards  
24 and forwards from medical appointments? We would all hope,  
25 one, human beings would all hope that they would have a partner

1 who will take care of them in their moment of need. But how do  
2 you think that made Mr. Pataki feel? Do you think he felt  
3 manly about it? You mock him for his lady, his then lady --  
4 his lady is not here. We didn't introduce evidence why the  
5 lady is not here, we will not go there, but let's just talk  
6 about that. He was a virile man, his lady is not here. That  
7 hurt him. Walmart hurts him when they deny what is plainly  
8 obvious, but the fact that he had his lady who had to travel  
9 back and forth from doctors, that hurt him. We're going to  
10 talk about that when we talk about damages. But, again, he  
11 gets right back up, he wanders throughout the store. That is  
12 evidence that he was indeed a virile man but he's not a virile  
13 man anymore. We're going to get to damages in a minute.

14 When you compare who was Peter Pataki -- because  
15 that's what Mr. McDonnell says: Who is this guy? Who is this  
16 guy? Well, we know he was a guy who had a lady, he had a  
17 girlfriend, right? He had some person who cared about him in  
18 his life. We knew the fact that he was able to pop up, we knew  
19 he was virile. Who is he? Who is he? Who is Peter Pataki?  
20 Peter Pataki is an honest man. He's a simple man. I am not  
21 going to use that language of beating anything. I don't want  
22 to beat. What I want to do is present evidence so you can take  
23 it back to the jury box and make a fair decision.

24 That's Mrs. Gardner who travels.

25 I'm going to switch to, let's see -- bear with me.

1 Bear with me, ladies and gentlemen. It's important. I'm  
2 attempting to go to the video, the second video. Bear with me,  
3 please. Well, technology will fail so I'm going to do what I  
4 can do. It's simple, we don't need that.

5 What do we know? Remember, what time were we? We are  
6 at, P-43H, 8:06:30, right? You're going to have your iPads but  
7 I would like for you to take note of the time, P-43I, 8:06:33  
8 Peter falls, 8:06:33, he falls, he falls. I didn't use that.

9 What do we also know? What do we also know what  
10 happens next? 8:15, 8:15, 8:15, I wish I could pull that up  
11 but I don't want to waste your time. 8:15:47, that's P-9, and  
12 8:15:54. Let's go to P-9, 8:15:47. Why is that important? My  
13 adversary chose to breeze past this but why is this important?  
14 8:15:47, what did Peter tell us? By the way, we apologize,  
15 Peter has waited some time to tell his story and certainly he  
16 couldn't follow my questions. He was a little nervous. He  
17 wanted to tell you, tell you, he wanted to tell you, he didn't  
18 want to distract you, he wanted to give you as much information  
19 to the point where he was -- actually during my questioning he  
20 wanted to speak to you. That's how important it is. But this  
21 is important. I spoke to him last night about this, very, very  
22 important, 8:15:47, that's Peter, Peter, he's talking to  
23 somebody. Do you remember what he told you? Do you remember  
24 what he told you? Next, P-43O, 8:15:54, please, please,  
25 please, promise me, when you get your iPads, I know you don't

1 have anything to write on, take a mental note, 8:15:54,  
2 8:15:54, 8:15:54. What's happening? Someone's bending down.  
3 Credibility, consistency, common sense. Someone's bending down  
4 picking up a thing. We know what the thing is. It's the thing  
5 that changed Mr. Pataki's life. Go back to the video and use  
6 your common sense.

7 I am going to have -- I will have more of a  
8 conversation with you so we don't have monitors, they're  
9 distracting.

10 8:17:20, that's P-43L, what do we know about that?  
11 That's Peter talking to Mr. -- rather that's Peter speaking  
12 with Ms. Betty Gardner. Mrs. Betty Gardner who told you the  
13 truth, who got handled to tell you the truth, you know, a  
14 cross-exam that went over an hour, two hours. She is just  
15 there to say that she saw a man fall, she saw a man fall. But  
16 more importantly, what did she tell you? What did she tell  
17 you? What did she tell you? She told you the man's foot was  
18 caught up in plastic. It's been over ten years. This is so  
19 common sense. She tells you she saw his foot in plastic. The  
20 plastic is not supposed to be there.

21 You know, what's important, P-43C, what do we know  
22 about that? These are the individuals who are hired to find  
23 this particular plastic. Pick it up. We all have common  
24 sense. We throw in our common sense daily. We go home, we go  
25 to work, even if it's not our responsibility at work, we see a

1 thing, we pick up a thing. You go home, I didn't do it, the  
2 kids left it, well, you pick it up anyway, the dirty laundry,  
3 you pick it up. The dog did some business. What do you do?  
4 Well, you bend down, you take a piece of tissue and you clean  
5 it. You don't say, well, it's his responsibility; it's not  
6 mine. That's essentially what Mr. McDonnell did. It's not our  
7 responsibility. We don't have to bring in a manager to prove  
8 anything. We don't have to prove anything. We're just going  
9 to sit here, nope, we didn't do anything. Common sense, you  
10 see a thing, you do the thing. You're responsible.

11 You're going to learn the language of invitee. What  
12 is the duty when you have an invitee, when you invite someone  
13 to your store to purchase your products? You have a basic  
14 responsibility to take care of them. You want them to purchase  
15 your product, it's a give-and-take. They purchase your  
16 product; you keep your store in a reasonably safe environment.  
17 And I submit to you that it shouldn't meet your definition of  
18 common sense that you invite your people into your store, you  
19 have people with garbage bags, they just go, they do nothing.  
20 They do nothing. They said we did nothing; they did nothing.  
21 I'm going to leave that point. You get it. I do not, do not  
22 -- I respect your time. I do not want to -- i respect your  
23 time I don't want to keep -- I respect your time.

24 P-43M, P-43M, look at the time. The time is 8:23. So  
25 what do we know? We know Mr. Pataki saw plastic and after he

1 fell. We know that he then gets escorted, gets escorted, to  
2 the management office at 8:23. What did he tell you? He goes  
3 and speaks to a manager. He says he knocked at a door. He  
4 described the woman with great specificity. We didn't hear  
5 her, did we? She didn't come in. We have a manager who's been  
6 sitting here. Did we hear him? No. Why is that?  
7 Credibility, consistency, common sense. You have it. You have  
8 the genius.

9 He says he sits in the office -- take your time,  
10 Roosevelt. He tells you he sits in the office and he fills out  
11 an accident form. We all know what accident forms are, whether  
12 it's a child who breaks a tooth at camp or falls down or had a  
13 fever. An incident occurred so what do we do? Members of the  
14 jury, common sense, it's been ten years, I don't know why we  
15 can't figure this out. Incident report. Where's this incident  
16 report? Wouldn't it have been nice? Members of the jury,  
17 wouldn't it have been nice? We're almost ten years after a  
18 slip and fall, it's not like they can say that it didn't  
19 happen. You see people bending down, picking up the thing. We  
20 have Mrs. Gardner who sees the thing. They had an opportunity  
21 to ask Ms. Gardner, Ms. Gardner, did you see what happened?  
22 Nobody asked Mrs. Gardner anything. Walmart has all the  
23 resources in the world but they want to blame little David.  
24 Little David, you didn't do an investigation. You didn't pull  
25 out a cell phone. My goodness, you have a camera. I'm so

1 sorry but this is, like, so just -- it's mind-boggling. You  
2 have a camera. You're able to zoom in, see the entire store  
3 but you want to blame Mr. Peter Pataki because he didn't pull  
4 out his cell phone? He didn't act appropriately after hitting  
5 the ground? It's insane. It's been ten years of insanity.  
6 And hopefully with your common sense, we can put an end to it  
7 to tell Walmart, you have a responsibility. When someone comes  
8 into your store, you have a responsibility. You don't get to  
9 shift the blame to little David. You wanted David to come and  
10 buy your meats but you don't want to take responsibility for  
11 him. How irresponsible is that? That is not how a responsible  
12 corporation acts. This is so simple. You saw it with your own  
13 eyes but they deflect and they distract.

14 Mr. Pataki, at 8:23:24, he walks and he, knock, knock,  
15 he fills out an incident form. Where's the incident form?  
16 Where is it? They want to blame Mr. Pataki for not having it.  
17 You got the Walmart manager sitting right there. Where is the  
18 incident form? Do we care about what happened? Do we want to  
19 know? Why don't we want to know? Why do we want to hide  
20 things? Well, use your common sense. What does it mean? What  
21 does it mean when a human being hides?

22 You know, when everyone was a child, nope, not me,  
23 Dad. Tell a little fib. Not me, uh-uh. What's you got there  
24 behind your hand there? Nothing. Are you sure? No. I don't  
25 -- I don't have anything. Well, maybe I got something little.

1                   Members of the jury, it's a bit comical. I hope you  
2 see it. There's no incident report because Walmart doesn't  
3 want you to know. Doesn't want you to know. They have all the  
4 resources to give you this information but they want to blame  
5 Mr. Pataki. Mr. Pataki, you didn't take a picture, did you,  
6 sir? You didn't take pictures? You didn't pull someone in the  
7 white coat. Well, my goodness, I was walking with someone  
8 straight to the manager's office. I did my part. I did my  
9 part. I told you what happened. I told you what happened.  
10 You just don't want to hear it. You don't want to hear it.  
11 That's why we don't have anyone testifying from Walmart, they  
12 don't want to tell you. That's why we don't have the incident  
13 report, they don't want to tell you. They blame us for not  
14 having it. Mr. Pataki of meager means. And that's why I'm  
15 glad to put the S on my chest because I can get past the stuff.  
16 I love taking little pieces of the puzzle together, put the S  
17 on my chest and be an advocate for my client. Because who's  
18 going to speak for him when they mock him? They mock little  
19 David. They mock him. Not on my watch, they ain't mocking  
20 him.

21                   What else do we know? What else do we know? I think  
22 we've proven the issue of liability. In law school we learned  
23 duty, breach, causation, damages. First year of law school,  
24 duty, breach, causation, damages.

25                   Did Walmart have a duty to keep Mr. Pataki safe and

1 use reasonable care? Yes, they did. Check.

2 Breach: Did they breach the duty? What does that  
3 mean? Did they fall below the standard of care of what you  
4 would have expected Goliath, Walmart, to do? I submit to you  
5 that we have proven it. They say we have nothing but, oh,  
6 we've got lots of something. Breach.

7 Causation: 200 pounds or more slamming down onto the  
8 pavement. Causation. They caused him to fall.

9 Now members of the jury, we're going to walk through  
10 the issue of damages. I submit we have proven duty, breach,  
11 causation, damages. They knew about it. We saw it. We saw it  
12 with our own eyes. Duty, breach, causation, damages. We have  
13 met our burden. That is the law and we have supplied you with  
14 the facts to meet each and every element of liability.

15 Liability.

16 Now members of the jury, we move on to the issue of  
17 damages.

18 Did Walmart cause Mr. Pataki to suffer damages? Oh,  
19 yes, they did. They did. Now, I hate when -- I don't like the  
20 language "hate." I strongly dislike when an individual  
21 purports to know what Roosevelt Jean, Esquire, is going to say.  
22 I don't like that. It doesn't make me feel good.

23 There was a claim -- oh, what I was going to tell you  
24 about time-unit rule. No one puts words in my mouth. I say  
25 what I mean, I mean what I say.

1                   The judge is going to instruct you upon the law.  
2 Listen to her. Do not listen to me. Do not listen to  
3 Mr. McDonnell. Listen to the judge. Here's my argument. You  
4 are free to deny it, accept it. Listen to the judge. Listen  
5 to the judge. She's the boss here.

6                   We have a thing called the time-unit rule. That  
7 allows me to present argument after I've proven the issue of  
8 liability, and I think I've met that burden. I can use that  
9 language that Mr. McDonnell did. Now let's talk about damages.

10                  How do you assess damages? How do you assess damages?

11                  Well, I'm going to ask you to break up the damages  
12 into several categories. In fact, that's what the jury verdict  
13 form says. There is a question which talks about past medical  
14 expenses. Let's do the easy part first, and I am going to try  
15 not to bore you, just to keep you really engaged. There's a  
16 certain number, the judge is going to tell you, plug in the  
17 number. We've met liability, we have economic -- we have the  
18 economic damages. I don't want to misquote but listen to the  
19 judge. Listen to the judge. She's the boss.

20                  Now, let's talk about this thing called the time-unit  
21 rule. What does it mean? It means that I'm allowed to say if  
22 you find liability against Walmart, this is how you can -- this  
23 is one method of assessing damages. Pick a unit of time that  
24 makes sense to you. I'm not going to lecture you. I kind of  
25 do that sometimes, I'm so sorry. But pick a unit of time that

1 makes sense to you. It can be a day, it can be a minute, it  
2 can be a week, it can be a year. Let's say, for example, you  
3 chose to use a year as a unit of time. Let's say you did that,  
4 for example. In a year's time, we've had about nine years,  
5 let's say in a single year, what is the value of the pain and  
6 the suffering and the loss of enjoyment of life that Mr. Pataki  
7 had? I want to pause that.

8                   What did we hear about his care? We heard that the  
9                   first care that he had was Clara Maass hospital and indeed he  
10                  was on a stretcher. After he got transported and he spoke to  
11                  the manager and he told the manager what happened and the  
12                  manager never created any type of report, that's fact. I'm  
13                  sure the manager -- whatever. We didn't hear about anything.

14 But after that he then goes on a stretcher.

15 Ms. Gardner did see him on a stretcher. Because you're going

16 to have part of the medical records and he's going to tell you

17 that he was coming in on a stretcher in the ambulance. It says

18 what it says, right? Trust your knowledge. Trust your eyes

19 when you are reading. Assess the damages, bear with me, bear

20 with me. It's ten years. Ten years of facts I've been trying

21 to cram into my head and articulate to you.

22 First he goes to Clara Maass. He gets treatment.

23 It's an emergency room. He gets some basic treatment. He's

24 given some pain medication. They send him on his way. They

25 take X-rays. The X-rays show what they show. He then comes

1 back. He then comes back. He goes to Clara Maass, he has some  
2 more workup.

3 Mr. McDonnell spoke about his team, his ring. We  
4 learned about Mr. DeZao. I am not Mr. DeZao. I'm Roosevelt  
5 Jean. A ring. He got some direction by a lawyer regarding  
6 care. Okay. Who knows what to do when you're involved in an  
7 accident and you have a corporation, I call them Goliath, who  
8 won't document a single incident report or bend down or kick  
9 around plastic that is obviously on the ground. It's never  
10 preserved. It's not preserved by a photograph. It's not  
11 preserved by picking it up and putting it in an envelope. You  
12 are already behind the eight ball. You are up against this  
13 corporation that has fancy charts and fancy lawyers and fancy  
14 presentations. You're already behind. If Mr. Pataki didn't  
15 have lawyers -- that's what lawyers do. We're here to advocate  
16 for clients. They blame him.

17 We know he goes to Clara Maass. We know that he goes  
18 to get injections with -- actually, before that time he goes to  
19 see Dr. Gaccione, you heard that. He gets some physical  
20 therapy, seven months. He tells you he's doing -- again,  
21 credibility, consistency. He tells you he's getting a little  
22 better but then he comes right back and he's not feeling well.  
23 He's not feigning. He's not feigning an injury. He didn't  
24 feign an injury when he was on the ground and saying, oh, my  
25 back. You've seen those commercials. If he really wanted to

1 create a fraud -- let's just say the word, right? When we talk  
2 about ring and all that other, you know, circular language,  
3 what are we trying to say about Mr. Pataki? What are we saying  
4 about my client? Say what you say. Don't use some fancy word.  
5 What are you saying about him? That he was not allowed to buy  
6 a chicken? Don't play around with words. Let's be direct. I  
7 like being direct with people. Look into a man's eyes, tell  
8 him what you -- or a woman. No disrespect. Look into an  
9 adult's eyes. Tell them what you want to tell them. Don't use  
10 fancy talk. He falls down, he gets injured. He has seven  
11 months of chiropractic care. He goes to see Dr. Koppel. He  
12 repeatedly has epidural injections in his neck and his back.

13 He goes to see Dr. Vizzone. You heard Dr. Vizzone.

14 I'm going to get to the time-unit rule. I hope you're  
15 following, I hope you're following, I hope you're following. I  
16 hope I'm being direct to represent my client. We are going to  
17 get to time-unit rule in a minute. Direct damages.

18 Dr. Vizzone. Dr. Vizzone's testimony is going to help  
19 us before we get to the issue of the time-unit rule. He was  
20 his patient. Dr. Vizzone is special in this case. Why?  
21 Because he's examined Mr. Peter Pataki at least, at least, 50  
22 times, and he told us about his expert opinion. And you saw  
23 how I worked through his expert opinion? I asked him, what was  
24 the basis for your decision that -- what was the basis of your  
25 conclusion? And he told us. And what did he tell us? We're

1 going to get to the time-unit rule in a minute.

2 We're going to talk about -- and at this point I will  
3 hit the lights.

4 So what do we know? What do we know about damages?

5 I'm going to start by -- we're going to start by -- I  
6 apologize. Before we get there. I told Mr. -- I told Dr. -- I  
7 told Dr. Vizzone -- bear with me. So sorry. It's been a long  
8 week. I know it's been a long week for you as well -- what was  
9 the basis for your opinion? What was the basis for your  
10 opinion? Don't just tell me, show me. And you're free to --  
11 he told us -- before we get -- he told us. He told us that  
12 Mr. Pataki has a herniated disc at C4-C5. He also tells us  
13 that Mr. Pataki told him by medical history, which is  
14 important, the subjective information, that he had no prior  
15 history. Again, let's stop right there.

16 Walmart had ten years to figure out -- like they say  
17 they have nothing to prove but what evidence do you hear? The  
18 first medical evidence that you hear is the Clara Maass medical  
19 records. That's what exists. We don't want you to go  
20 speculate. The first medical record that exists in this case  
21 is Clara Maass. You will have an opportunity to hear about it.  
22 We learned that Mr. Pataki has a C4-C5 herniated disc.  
23 Dr. Vizzone saw it on the imaging. He is a board certified  
24 orthopedic surgeon. He does -- not only does he review films  
25 but he does surgery. He is the only -- he is the only expert

1 that you heard in this case that has the ability to perform  
2 spine surgery proficiently.

3 We heard from Dr. DeMarco. And since we're here, Dr.  
4 DeMarco, very interesting, Dr. DeMarco, he said he reviewed the  
5 films, but he says he hasn't performed surgery in 20 years,  
6 that's a fact, since 2003, 2003. He hasn't performed a spine  
7 surgery since that time. Is he a spine expert? No. There's  
8 other experts in his office that are qualified. He does elbows  
9 and some other body parts. He hasn't done a spine surgery in  
10 over 20 years when he was a resident versus a doctor who's a  
11 board certified orthopedic surgeon who sees MRI films on a  
12 daily basis. Not only does he see MRI films on a daily basis,  
13 but he actually operates on people. He is the only person who  
14 was actually a surgeon. He is the only person who actually,  
15 with his own eyes, saw the disc material. Let that breathe for  
16 a minute. He saw the disc material with his own eyes. He was  
17 in surgery. He saw the disc. He is the only expert that has  
18 testified that actually saw the disc with his eyes. He saw the  
19 disc. He saw it on the MRI, he called it a herniated disc. He  
20 extracted it. We're going to see it in a presentation of how  
21 he removed the disc because he believes the disc was causing  
22 impingement. P-45 was evidence. Again, I'm showing you my  
23 work. I'm showing you Dr. Vizzone's work.

24 We also see P-46 and P-47. P-46, P-47. P-46 this is  
25 a December 7, 2016, MRI. Here we have P-47 is a June 20, 2016,

1 MRI. Let's stay with the cervical spine.

2 So we saw the herniated disc. He calls it a herniated  
3 disc. He sees it, he identifies it. He says it's a proximate  
4 cause from the accident. Here it is. He showed it to you. He  
5 showed it to you. Not only did he see it but he saw it when he  
6 operated. He's the only person in the case who's actually seen  
7 the disc with his own eyes.

8 Let's go to the lumbar spine.

9 We are going to talk about pain and suffering, loss of  
10 enjoyment of life.

11 There's a herniated disc. Dr. Vizzone sees the  
12 herniated disc. He sees it. He sees it. He gives injections  
13 because it's causing Mr. Pataki pain. He sees it not only on  
14 the MRI but he sees it when he opens the guy up. He slices his  
15 body and he sees it; but, yet, Walmart doesn't want to talk  
16 about that. They want to talk about other stuff, rings and  
17 whatnot. I still don't know what that means.

18 P-48A and P-48B, what is that? That's Mr. Pataki's  
19 spine. He's the bionic man. That's metal. That's not how he  
20 was born. That's not how God made him but that's how he's  
21 going to die with that in him.

22 Now, the other evidence, P-49 through -- and I'm going  
23 to go through it very quickly -- 49, 50, 51, 52, 53, 54, 55,  
24 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71,  
25 72, 73, 74, 75, right? I am not going to go through them

1 individually. I'm not a medical doctor, I don't purport to be  
2 one. But what did we learn? We learned a little bit about --  
3 I know a little bit about medicine, right? What do we know  
4 about the discs? We know that the discs are a gelatinous  
5 material called the nucleus pulposis, right? And surrounding  
6 the nucleus pulposis is an annulus fibrosus. We had an  
7 explanation of a jelly doughnut that when you squeeze on that  
8 jelly doughnut and the disc material doesn't come out, it's a  
9 bulge. But when the disc material pops out, it's a herniated  
10 disc. And that jelly, we may have had that incident where it  
11 falls on our favorite tie, if that jelly touches a nerve root,  
12 it can cause impingement. It's like when you have wires going  
13 from point one to point two, you step on the wire, you get  
14 what? You get that radiating pain. You get that little funny  
15 feeling. That's call radiculopathy. Well, he had  
16 radiculopathy. How do we know? We know that because  
17 Dr. Vizzone examined him. He's the only individual that  
18 examined him for radiculopathy.

19 We have these two doctors -- and I want to comment  
20 upon the doctors for a moment.

21 When we talk with credibility, consistency, and common  
22 sense, Dr. DeFalco, he doesn't do spinal surgeries. He says he  
23 is an independent medical examiner. Members of the jury, 99 --  
24 he says it himself, 99.9 percent of his work is for defendants.  
25 Does he have an interest? Mr. McDonnell talked about whether

1 people have an interest in the case. You don't think he has an  
2 interest in sustaining his livelihood? That's how he eats.  
3 That's how he makes his money, in addition to the other work  
4 that he does. I don't fault him for what he does for his  
5 patients. He does what he does. He's a doctor who does what  
6 he needs to do. But you mean to tell me you don't have an  
7 interest but Dr. Vizzone has an interest? Ninety-nine --  
8 that's how your bread is buttered. That's how you make your  
9 money and you don't have an interest? Use your credibility,  
10 use your common sense.

11 He also said something yesterday which was just really  
12 baffling. I don't know if you caught it. He said it really  
13 quickly, I wrote it down. He said, Mr. Pataki -- in fact, I  
14 was watching the game last night and the Eagles are playing and  
15 I'm thinking, well, maybe Mr. Pataki should have been on that  
16 field. Maybe he could have helped out the Eagles a little bit  
17 better and maybe they would have won by more points. Maybe  
18 Mr. Pataki should have been on the other team. Right? Maybe  
19 he could have helped them win. Why do I say that? It's kind  
20 of odd for Roosevelt to say. Well, he said it himself. He  
21 said a person with an L5-S1 single-level fusion, it's not  
22 incompatible with him being in the NFL. What does that mean?  
23 Why would you say that? Again, Walmart mocking Mr. Pataki.  
24 It's not credible. It's not inconsistent. It should not meet  
25 your definition of common sense.

1 I'm showing you what has been previously marked for  
2 identification, it is the image of Mr. Pataki. It's an  
3 illustration. It's an illustration. It's an illustration of  
4 what happened to him. We learned that he had an incision made  
5 in his neck. It's a fact. We learned that at C5-C6 the disc  
6 was removed, was sliced. That's a fact. But Walmart doesn't  
7 want to talk about that. But I submit to you that is pain,  
8 that is suffering, that is loss of enjoyment of life. We see  
9 in Section C after they slice him, a discectomy is performed.  
10 They pulled the disc out. Walmart doesn't want to talk about  
11 that. That is pain, that is suffering, that is loss of  
12 enjoyment of life. The end plates were prepared for  
13 instrumentation. I'm sure there's a fancy little machine,  
14 sucking out the disc. They don't want to talk about it. But  
15 that is pain, that is suffering, that is loss of enjoyment of  
16 life. A Mobi-C was placed into the interbody space. He has a  
17 new disc. That's not how he was born. That is pain, that is  
18 suffering, that is loss of enjoyment of life. The fact that he  
19 has to live with cages fusing his lumbar spine, that is pain,  
20 that is suffering, that is loss of enjoyment of life.

21 Members of the jury, I am going to try to get to it.  
22 You have been sitting here and I don't want you to be in pain.  
23 I am going to turn the lights on.

24 Now I'm going to talk to you about the time-unit rule.  
25 Mr. McDonnell is correct, I did intend to talk about the

1 time-unit rule. He's correct in that regard. But it's not  
2 what he said I said. It's not what I said. It's not what it  
3 is.

4 So you heard about Mr. Pataki's treatment for the past  
5 nine years. It's a fact. He's had these injuries for nine  
6 years. He walks with a cane. That's a fact. We didn't  
7 belabor the point. It's obvious. The man has a fused spine,  
8 he has a cane, common sense. We have a funny way in the law  
9 there's a grid that talks about how many more years we have.  
10 Nobody knows how many more years we have. Hopefully we have  
11 years way into our adulthood or we're able to see grandkids and  
12 great-grandkids and we're old and gray and brittle and we have  
13 made our contribution to the world and then we leave the world.  
14 But according to this standard, Mr. Pataki has 33 -- it's sad  
15 to think about -- 33.2 years to live. That's just a standard,  
16 right? And we know that he's had nine years of pain,  
17 suffering, loss of enjoyment of life. Having numerous  
18 injections, having an implant in his cervical spine, having an  
19 implant in the lumbar spine. That is pain, that is suffering,  
20 that is loss of enjoyment of life. The fact that he used to  
21 have a girlfriend, he doesn't have a girlfriend any longer, the  
22 fact that he can't do the things that he wants to do, the fact  
23 that he can't just go up the steps when he wants to, the fact  
24 that he has to wake up every single day and feel the pain, the  
25 fact that he feels the rain before it comes, he's his own

1 weatherman. He knows when the rain is going to come. He feels  
2 it in his body. That is pain, that is suffering, that is loss  
3 of enjoyment of life.

4 So now we get to the time-unit rule, the big to-do,  
5 the big time-unit rule. Pick a unit of time. Every year of  
6 the past nine years. If Mr. Pataki didn't have the injuries  
7 which were caused by Walmart, what could he have done with his  
8 life? Every man has a full value of his life. Every woman has  
9 the value of their life. Every adult has a value of their  
10 life. What do they contribute to the world? What do they  
11 contribute? What can't Mr. Pataki do any longer? Those are  
12 just facts. We don't have to belabor the point.

13 The emotional toll of having to live with this for the  
14 rest of your life, of having these permanent fixtures in your  
15 body, that is pain, that is suffering, that is loss of  
16 enjoyment of life, it is. The fact that he can't do the  
17 biking, he can't do the jogging, he can't play pickup  
18 basketball, the fact that he can't do simple things that most  
19 human beings take for granted, taking the steps for better  
20 health, the fact that he went from either 230 to 200 to now 180  
21 pounds, he's a shell of the man that he used to be. These are  
22 facts. For Walmart to mock him and say that, well, he could be  
23 in the NFL, oh my goodness, that is just -- I don't know how  
24 else to explain it. You mock a man when he's down, you kick  
25 him when he's down, that is loss of enjoyment of life.

1                   So you can take a year. What is the value of that  
2 year? What is that worth? You know what -- you know the value  
3 of a dollar through your common sense. In a year, what is that  
4 worth? What is that worth? And if you take that and you  
5 multiply it a year, what was that worth? The second year, what  
6 is that worth? The third year, what is that worth, up to the  
7 ninth year. What is the value of this man's life? Although  
8 Walmart wants to diminish him. We don't know who he is. Allow  
9 me to introduce you to Mr. Peter Pataki, a man who never asked  
10 anyone for anything. A man who was self-sufficient. He didn't  
11 want to have a team of people, his lady transporting him. He  
12 wanted to be a man, take care of himself. What is that worth?  
13 His inability to do the things that made him happy in that  
14 one -- first year of 2015, just bear with me please, 2015,  
15 2016, 2017, 2018, '19, '20, '21, '22, '23, we are now in '24,  
16 we're going into '25. If you add each one of those years, you  
17 know the value of a life. You heard him testify. What is the  
18 value of each of those years? I submit to you that you should  
19 add them up, year one, plus year two, plus year three, plus  
20 year four, plus year five, plus year six, plus year seven, plus  
21 year eight, plus year nine, and you get the refrain, the law  
22 says he likely has, hopefully he has much -- many more years,  
23 but you are allowed the same thing that you did in those first  
24 nine years you do in the next 33.2 years, what is that worth?  
25 I submit to you that you should have a column and you add each

1 of those years. What is the value for this man's life? And  
2 that is how, I submit to you, you should come to your  
3 conclusion as to what is the value of Mr. Pataki's pain, his  
4 suffering, and his loss of enjoyment of life.

5 Look, Mr. Pataki didn't ask for this fight, he didn't.  
6 It wasn't his plan to walk into a Walmart and to slip. Oh,  
7 I've fallen and I can't get up. I'm being funny of course.  
8 That wasn't his plan. The man wanted to get some chicken, go  
9 in the aisle, Pathmark saw a condition, they should have  
10 cleaned it, they didn't clean it, now they mock him. I submit  
11 to you that's how you should come to your conclusion of loss of  
12 enjoyment of life.

13 Now, I am going to conclude. I want to thank you for  
14 being patient with me. I hope that you were seeing me think as  
15 I went on to try to give you the information, just be plain  
16 with you, no fancy words, no fancy words. Walmart had a duty,  
17 they breached that duty, now my client is injured, and it's up  
18 to you. Again, this has been ten years, approximately ten  
19 years, nine years to bring this to a conclusion. If I have  
20 said anything which is incorrect, use your memory. If I have  
21 said anything that offends you, I apologize. My goal as an  
22 advocate is to make sure that the water does not get muddy,  
23 that I present the facts to you in an organized, succinct way  
24 that doesn't hide anything, that just gives it to you. I hope  
25 that I've given it to you. I hope that I've shown my work. I

1 ask that for your patience for just a little bit longer because  
2 Mr. Pataki has been waiting for over nine years. I ask for  
3 your patience once more. Certainly listen to what I say,  
4 listen to what Mr. McDonnell says, listen to the judge who will  
5 instruct you on the law, and I submit to you that after  
6 listening to all of the facts and all the evidence, you will  
7 reach the only conclusion which is just based upon the law,  
8 based upon the facts that we presented to you, and based upon  
9 your own given common sense, and that is, Walmart, the Goliath,  
10 is negligent. We've proven that to you. And that my client,  
11 Peter Pataki, born October 1975, put some respect to his name,  
12 don't just call him we don't know who he is. He's a man. I  
13 submit to you that the evidence that we have heard is  
14 sufficient for you to render a verdict for him based upon the  
15 law, the facts and your common sense.

16 Members of the jury, thank you for your time, thank  
17 you for your service. I am going to sit down now.

18 THE COURT: Thank you, Counsel. Anything, Counsel, we  
19 need to address before we move forward?

20 MR. McDONNELL: Yes, Your Honor.

21 THE COURT: Ladies and gentlemen, we have gone a  
22 little bit longer than I anticipated. It's 1:20. Do you want  
23 to break and have your lunch and then come back and charge or  
24 do you want me to charge you? It will probably take me about  
25 30 minutes. You guys talk about it amongst yourselves. We can

1 take a 20 or 30-minute break so you can eat.

2 You want to go right through? Give me one second to  
3 talk to the lawyers.

4 Do you want a five-minute comfort break? Okay. We  
5 will take a five-minute comfort break. Don't talk about the  
6 case, don't think about anything yet until I give you the  
7 instructions on the law and that will be the final piece you  
8 need before you can start to deliberate. Okay?

9 THE COURTROOM DEPUTY: All rise.

10 (The jury leaves the courtroom at 1:21 p.m.)

11 THE COURT: Counsel, what's the issue?

12 MR. McDONNELL: Your Honor --

13 THE COURT: Hold on. There's too much noise. I can't  
14 hear. I'm sorry. Go ahead.

15 MR. McDONNELL: I emailed the proposed curative  
16 instructions to counsel and Haley. We would ask for a curative  
17 instruction that there is no future medical bills and he  
18 cannot --

19 THE COURT: That was my concern. You put a verdict  
20 sheet up and you said there is a line for future medical bills.  
21 I made a note of it.

22 MR. JEAN: I am incorrect. I thought that was the  
23 one -- the final one that was presented.

24 THE COURT: It's not.

25 MR. JEAN: So I am wrong, I am wrong, I am wrong.

1 And, in fact, when I caught it, I oofed and I didn't say  
2 anything else. So whatever curative instruction Mr. McDonnell  
3 requests or the Court believes is appropriate, I agree. I  
4 agree.

5 THE COURT: I will look at the instruction. I am  
6 going to do two things. When I go over the verdict sheet, I am  
7 going to stress that this is the correct sheet. There's always  
8 drafts and no blame on either side but there are drafts and we  
9 made some changes this morning and it was a mistake of all,  
10 none of us caught it. I just want to mention these are the  
11 only two lines of which you can give damages. So that will  
12 take care -- I want to specifically reference it when I go over  
13 the verdict sheet because he discussed it.

14 Can you send me whatever -- did you get something from  
15 Mr. McDonnell, Haley?

16 THE COURTROOM DEPUTY: Yes.

17 THE COURT: Let me take a look at it.

18 Any other issues, Mr. McDonnell?

19 MR. McDONNELL: Yes, Your Honor. Mr. Jean argued for  
20 spoliation and we request the Court charge the jury there has  
21 been no spoliation.

22 I would ask for this charge: Plaintiff has the burden  
23 of proof. There's been no evidence that Walmart hid evidence  
24 or witnesses. You can draw no adverse inference in Walmart not  
25 presenting evidence. As part of this litigation, plaintiff has

1 the opportunity to discover, present any evidence from Walmart  
2 that he believes supports his claim. Plaintiff cannot meet his  
3 burden of proof by arguing or suggesting you can draw an  
4 adverse inference because Walmart has not presented certain  
5 evidence.

6 The other instruction [sic] is, repeatedly David and  
7 Goliath, stressing the size of Walmart, the resources of  
8 Walmart, the resources of counsel, and I would request a charge  
9 that says, I'll instruct you you cannot consider the size and  
10 resources of the defendant in the verdict.

11 There was also mention by Mr. Jean --

12 THE COURT: Let me do one at a time because you are  
13 going a little bit too fast.

14 The only thing that you emailed me that I have right  
15 now is the spoliation issue and just no future medical bills.  
16 So here's what I suggest that we do. Okay.

17 We resolved the first issue with respect to the  
18 medical bills.

19 I am concerned, only because it was mentioned multiple  
20 times, and the defendant does not have a burden of proof and  
21 you did not ask for an adverse inference charge, and you  
22 essentially argued spoliation of evidence and adverse inference  
23 charge. I think he was entitled to reference it. He said he  
24 filled it out. No one's ever seen it. That's fair. I think  
25 you went far beyond that.

1                   My other concern is when you say, the Walmart manager  
2 is here and you didn't hear him testify. He doesn't have an  
3 obligation. You have equal access to all witnesses. You could  
4 have called him. In fact, I said, when I precluded your  
5 expert, I expect you might want to call an expert and put in  
6 the Walmart handbook. So I think that's my concern.

7                   With respect to the resources -- let's just deal with  
8 them one at a time. So I will give the instruction on future  
9 medical. That resolves that.

10                  I added in -- where did I add in Walmart -- I took it  
11 out as a separate instruction but I added it in about it being  
12 a corporation, they get a fair -- where is that? Does anybody  
13 recall where I added it? Mr. McDonnell, do you recall?

14                  MR. McDONNELL: I know where it was in the original  
15 one, Judge, but I have to look --

16                  THE COURT: I'm looking.

17                  MR. McDONNELL: -- at what we got last night.

18                  THE COURT: I gave it in Charge Number 7. And so I  
19 suggest after that first paragraph we heard so -- I would say  
20 so you should disregard any argument otherwise, such as  
21 references to the resources of a corporation versus an  
22 individual. I think, in general, again, he can say if it was  
23 in the context of they have 800 employees that work there on  
24 this shift from five to 12 and this sat on the floor for five  
25 minutes and they should have seen it, that's different but

1 that's not what you argued. You argued in general that, you  
2 know, I think there is -- there is a place for David and  
3 Goliath but I think you -- just as I thought Mr. McDonnell went  
4 too far, I think you went dangerously close to suggesting just  
5 because Walmart's bigger, I mean, you actually said it, and has  
6 more money, that they should have somehow produced more  
7 evidence or done something, which is unfairly shifting the  
8 burden of proof to the defendant.

9 MR. JEAN: Your Honor, respectfully, I was merely, on  
10 average, weighing what Mr. McDonnell referenced. He put a  
11 burden, which we do have a burden, of Mr. Pataki, he had a cell  
12 phone, he didn't take any photographs. But when we look at the  
13 evidence that did come in, my client does say, and I don't  
14 think Walmart -- Walmart does not deny that he came into their  
15 office and he advised them of the fall and yet we hear -- we  
16 don't hear that information.

17 THE COURT: That is all fine. I think that is all  
18 fine. You didn't ask for a spoliation charge, you didn't file  
19 a spoliation motion. I have no idea what happened in  
20 discovery, if it was asked for, if Walmart said it doesn't  
21 exist, if Walmart said he never filled one out, I have no idea.  
22 That ship has long sailed in this ten-year-old case or  
23 eight-year-old case.

24 So I am going to tell them at the end of Paragraph 1,  
25 in Charge Number 7, I'm simply going to emphasize a little bit

1 more what we were already going to tell them, to disregard any  
2 argument otherwise such as references to resources of a  
3 corporation versus an individual. That suggests that somehow  
4 they have better access to lawyers and, therefore, they have  
5 more money and they could have figured out what the plastic  
6 was. You both argued that ad nauseam. But when you start  
7 referring to the resources, that's exactly what we're not  
8 supposed to be doing and it's already in the charge. So all I  
9 am going to do is add that sentence.

10 Is that sufficient, Mr. McDonnell?

11 MR. McDONNELL: For the resources, Your Honor. But I  
12 don't think that alleviates the spoliation because --

13 THE COURT: I am just dealing with one thing at a  
14 time. So that's that.

15 MR. McDONNELL: Yes, Your Honor.

16 THE COURT: Now, with respect to evidence, I would  
17 suggest to address that issue it would be added at the end of  
18 the charge, Charge Number 3 on Page 4 where I talk about  
19 evidence that was struck and they should disregard. I would  
20 suggest I add a paragraph that "Plaintiff has the burden of  
21 proof. There is no evidence that Walmart hid evidence or  
22 witnesses. You can draw no adverse inference from Walmart not  
23 presenting evidence as part of this litigation. Plaintiff had  
24 the opportunity to discover and present any evidence from  
25 Walmart that he believes supports his claim. Plaintiff cannot

1 meet his burden of proof by arguing or suggesting you can draw  
2 an adverse inference because Walmart has presented certain  
3 evidence." I would just simply suggest to that because he  
4 specifically referenced and pointed out Mr. Martinez -- is that  
5 your name, I'm sorry, yes -- that everyone has full access to  
6 witnesses and you certainly could have called him. Again, if  
7 you are going to comment, I think the rules are very clear, if  
8 you're going to comment about someone not calling a witness,  
9 you are supposed to ask permission first and get an adverse  
10 inference charge. And I think that it's inappropriate to do it  
11 but I will hear you, Mr. Jean.

12 MR. JEAN: I have nothing to add, only that  
13 Mr. McDonnell referenced my client and what evidence he  
14 supplied and did not supply. What is good for Mr. McDonnell is  
15 what I was attempting to do by having some balance to talk  
16 about -- well, actually, to answer Your Honor's question, the  
17 plaintiff has a counterclaim, if I'm not mistaken, in their  
18 complaint. So they have a duty here --

19 THE COURT: They have a counterclaim?

20 MR. JEAN: Well, I was reading their defense. They  
21 make certain claims against my client that he didn't use  
22 reasonable care and they make a bunch of other claims. I was  
23 just attempting to balance the assertion that the defense was  
24 making. So there is an obligation for them to produce evidence  
25 in discovery. We didn't have any incident report.

1                   THE COURT: Again, I think it's fair for you to  
2 comment generally on the fact that your client testified he  
3 filled out a form and, apparently, there was testimony he went  
4 to an office. That's all fair. Where I think you crossed the  
5 line is saying, and they didn't call Mr. Martinez to come up  
6 and tell you about where that incident report is -- I'm  
7 paraphrasing -- and they didn't call him to come up and tell  
8 you X, Y, Z. I didn't approve of an adverse inference charge  
9 and I would have never allowed it. I think it's not  
10 appropriate. You were attempting to shift the burden of proof  
11 beyond simply mentioning things in general, such as, how many  
12 employees were working that night? Well, you know, we don't  
13 know that. There's been no evidence. They want to argue that  
14 my client's comparatively negligent, in that context, they  
15 haven't put on any facts. My guy is one guy walking through  
16 the store. They have 40 people on this shift or something like  
17 that. That's all fair. But to say they didn't call someone I  
18 think crosses the line.

19                   MR. JEAN: Your Honor, the defense -- the defense  
20 mentioned the witnesses that Mr. Pataki failed to call. You  
21 didn't hear about his friends who watch him play tennis or the  
22 woman, if I'm not mistaken, if I'm wrong, I'm wrong, but the  
23 person who drove him.

24                   THE COURT: Yes.

25                   MR. JEAN: They made commentary about witnesses that

1 the plaintiff failed to present.

2 THE COURT: That goes to your client's credibility.  
3 That goes to whether or not your client is credible, that's how  
4 I understood that, and whether or not his claims that this  
5 occurred and that this was Walmart's fault and he suffered  
6 injuries. The comments were, they haven't called anyone who  
7 talked about what he was like before and what he is like now.  
8 So we have no information about that nor did Mr. Pataki,  
9 himself, tell us about that other than some general  
10 information. And you do have the burden of proof. So I think  
11 that that's the difference.

12 My concern is you suggested that Walmart has a burden  
13 of proof; and other than proving comparative negligence, they  
14 don't and that's what I am going to tell them.

15 MR. JEAN: That's fair.

16 THE COURT: So I am going to add that at the bottom of  
17 Page 3. And when I talk about burden of proof on Charge Number  
18 6, I am just going to add that Walmart only has the burden as  
19 to comparative negligence.

20 Does that address your issues, Mr. McDonnell?

21 MR. McDONNELL: Well, Your Honor, he essentially asked  
22 to draw an adverse inference.

23 THE COURT: I'm going to give what you asked me to at  
24 the end of Charge 3.

25 MR. McDONNELL: Okay, great.

1                   THE COURT: What I am saying is I am going to repeat,  
2 under Charge 6, Walmart only has the burden as to comparative  
3 negligence, to be perfectly clear, and they don't have a burden  
4 to show anything else. And that's consistent with the charges  
5 we are already giving. What else?

6                   MR. McDONNELL: That's satisfactory, Your Honor.

7                   The last issue we just raised is Mr. Jean, it's ten  
8 years, it suggests that somehow Walmart caused the delay.

9                   Maybe just a generic charge that, you know --

10                  THE COURT: I don't think that's necessary. It's a  
11 ten-year-old case. I don't know why, quite frankly, it's been  
12 ten years to try it. All I know is I got it approximately nine  
13 months ago and I've tried my best to try it. We've had a lot  
14 of unfortunate instances. We are at the end, I am not saying a  
15 word about that.

16                  MR. McDONNELL: Your Honor, if I can just take a  
17 break.

18                  THE COURT: Take a two-minute break and then I'm going  
19 to bring them back because they are not having their lunch.

20                  Counsel, I am going to tell them when I add a few  
21 things, they are not going to be written in the charge that I  
22 give them, but I will add that and read it to them because we  
23 don't have time to revise it at the moment.

24                  Do you want to put a copy of the charge and the  
25 verdict sheet on each chair, please?

1 Off the record.

2 (Off the record discussion.)

3 THE COURTROOM DEPUTY: All rise.

4 (Brief recess taken from 1:35 p.m. until 1:38 p.m.)

5 THE COURTROOM DEPUTY: All rise.

6 MR. McDONNELL: Your Honor, just briefly. I was  
7 leaving the courtroom. If there could be an amended jury  
8 charge with those extra charges, I think it's important the  
9 jury see all the charges.

10 THE COURT: So you want me to tell them now they have  
11 to take lunch because I have to go retype it?

12 MR. McDONNELL: No, Your Honor, maybe we can just  
13 either handwrite it or --

14 THE COURT: They are already copied and on the jury  
15 chairs.

16 MR. McDONNELL: Okay.

17 THE COURT: I think these are just simple additions.  
18 I'm ad libbing. If you really want me to do that, then I will  
19 tell them that they can follow along but we have made some  
20 changes.

21 Ms. Dominguez can go up and type it in but then you  
22 are both going to have to look at it and tell me you agree with  
23 what it says, and they are going to wait longer.

24 I don't think these are huge issues or stray much from  
25 what I was already going to tell them; I'm simply emphasizing a

1 little bit more.

2 MR. McDONNELL: I understand, Your Honor.

3 THE COURT: But it's your case. What do you want me  
4 to do? We are already at 1:39 and I told them that we would be  
5 done by 12:30.

6 MR. McDONNELL: Your Honor, can we send them back with  
7 the charge and instructions and say you are just going to send  
8 the other part in within a few minutes?

9 THE COURT: I am not sending two instructions. So you  
10 can see the Realtime of what I said I'm going to charge. So  
11 can you go upstairs, type it in, just print those pages out  
12 that we made changes to, let them look at it. You can do it  
13 while I am doing the charge. If they both are in agreement  
14 with it, then you can go up and print eight new copies. Okay?

15 MR. McDONNELL: Thank you, Your Honor. I appreciate  
16 that.

17 THE COURT: All right. Bring them in.

18 Just for the record, the jury instructions, when they  
19 are the final, will be marked as C-1 and all the evidence that  
20 counsel has moved into evidence is already loaded on the iPads.

21 (Exhibit C-1 was received in evidence.)

22 THE COURT: Counsel, I prefer if you think I misread  
23 something or skip reading something you interrupt me rather  
24 than me having to go back because I think that's disjointed for  
25 the jury. So if I skip a sentence, I try not to, or if I read

1 something incorrectly or forgot a word that you think is of  
2 consequence, speak up.

3 THE COURTROOM DEPUTY: All rise.

4 (The jury enters the courtroom at 1:40 p.m.)

5 THE COURT: Okay. Please be seated.

6 So we are ready to charge, Mr. Jean?

7 MR. JEAN: Yes, Your Honor.

8 THE COURT: Mr. McDonnell?

9 MR. McDONNELL: Yes, Your Honor.

10 (JURY INSTRUCTIONS BY THE COURT)

11 THE COURT: Okay. Ladies and gentlemen, this is the  
12 final part of the case before you deliberate. On your chairs  
13 when you came back should be two things: One is the jury  
14 instructions, which I am going to review with you now, and then  
15 the smaller few pages is the verdict sheet which I will review  
16 with you in terms of how to make your decision.

17 I know your lunch is here. We have a microwave. Ms.  
18 Minix can assist you with that. We've gone a little bit  
19 longer. I apologize.

20 I will also tell you, as I go through these jury  
21 instructions, just while you were waiting, which happens often  
22 when we have closing arguments, the lawyers agreed and I agreed  
23 to add certain things, so you will get a new copy before you  
24 actually go in the jury room. We will take that one from you  
25 because I have added a few things that you will hear me read.

1 So if you follow along, I will point that out to you. Okay?

2 All right.

3 These are the jury instructions. Some of them are  
4 similar to what you heard in the beginning just to remind you,  
5 but I am required to go through and go through all of them.

6 Charge No. 1: You've heard the evidence and you will  
7 now be asked to decide what the facts are and then apply those  
8 facts to the law that I will give to you.

9 You, and only you, are the judges of the facts. You  
10 have to decide what happened and I play no role in judging the  
11 facts. You should not take anything I said or did during the  
12 trial as indicating what I think the evidence or what your  
13 verdict should be. My role is to be the judge of the law. I  
14 made whatever legal decisions had to be made during the course  
15 of the trial and I will explain to you now the legal principles  
16 that must guide your decisions, and you must follow the law as  
17 I give it to you whether you agree with it or not.

18 Charge No. 2: As you saw, during the trial it was  
19 necessary for me to talk with the lawyers out of your hearing  
20 by having a sidebar conference. These conferences are  
21 necessary for me to fulfill my responsibility, which is to make  
22 sure that the evidence is presented correctly to you under the  
23 law.

24 I may not always grant a request for a conference and  
25 you should not consider me granting or denying any request for

1 a conference, or asking for one on my own, as any indication of  
2 my opinion of the case or what your verdict should be.

3 Charge No. 3: Evidence.

4 As you deliberate, you must consider the evidence that  
5 was presented to you in this case. The evidence from which you  
6 are able to find facts consists of the following:

7 1, the testimony of witnesses;

8 2, documents and other things received as exhibits,  
9 and they will be loaded on an iPad and given back for you to  
10 take to the jury room;

11 3, any facts that are stipulated, that is, formally  
12 agreed to by the parties, and we have one stipulation which is  
13 the amount of medical bills, which I will discuss later.

14 The following things are not evidence:

15 Statements, arguments or questions of lawyers for the  
16 parties in the case;

17 Objections by lawyers;

18 Any testimony that I might have told you to disregard;  
19 and.

20 Anything that you may have seen or heard about the  
21 case outside the courtroom.

22 You must make your decision based on the evidence that  
23 you saw and heard in court. Do not let rumors, suspicions, or  
24 anything else that you have seen or heard outside of the court  
25 influence your decision in any way.

1           You should use your common sense in weighing the  
2 evidence. Consider it in light of your everyday experience  
3 with people and events and give it whatever weight you believe  
4 it deserves. If your experience tells you that certain  
5 evidence reasonably leads to a conclusion, you are free to  
6 reach that conclusion.

7           There are rules that control what can be received into  
8 evidence. When a lawyer asks a question or offers an exhibit  
9 into evidence, and a lawyer on the other side thinks that it is  
10 not permitted by the rules of evidence, the lawyer may object.  
11 This simply meant that the lawyer is asking that I make a  
12 decision on a particular rule of evidence. You should not be  
13 influenced by the fact that an objection was made. Objections  
14 to questions are not evidence. Lawyers have an obligation to  
15 their clients to make objections when they believe that  
16 evidence offered is improper under the rules. You should not  
17 be influenced by the objection or by the Court's ruling on it.  
18 If the objection is sustained, you should have ignored the  
19 question; and if it's overruled, you treat that answer like any  
20 other answer. If you were instructed that some item of  
21 evidence was received for a limited purpose only, then you  
22 should have followed whatever the instruction was I gave at the  
23 time.

24           Also, certain testimony or other evidence that I may  
25 have ordered struck from the record, you were instructed to

1 disregard this evidence. Do not consider any testimony or  
2 other evidence that I struck or was excluded. Do not speculate  
3 about what a witness might have said or what an exhibit might  
4 have shown.

5 So this is an area where I am going to add just a few  
6 things.

7 We will talk about burden of proof but I want to  
8 emphasize to you that the plaintiff has the burden of proof and  
9 there was some comment but there's been no evidence that  
10 Walmart hid evidence or witnesses in this case, and you should  
11 draw no adverse inference from Walmart not presenting evidence.  
12 Defendant has a right to not present any evidence. I told you  
13 that during jury selection.

14 As part of this litigation, both parties have the  
15 opportunity to discover and present any evidence -- in this  
16 case, plaintiff from Walmart and Walmart from plaintiff -- that  
17 they believe will support their claim.

18 Plaintiff cannot meet its burden of proof by arguing  
19 or suggesting that you draw an adverse inference because  
20 Walmart has not presented any evidence. That is a defendant's  
21 right.

22 Charge 4: Direct and Circumstantial Evidence.

23 There are two types of evidence that you may use in  
24 reaching your verdict. One type is called "direct evidence."  
25 An example of direct evidence is when a witness testifies about

1 something the witness knows through their own senses, something  
2 the witness has seen, felt, touched, or heard, or did. If a  
3 witness testified that he saw it raining outside, and you  
4 believed him, that would be direct evidence that it was  
5 raining. Another form of direct evidence is an exhibit where  
6 the fact to be proved is its existence or current condition.

7 The other type of evidence is circumstantial evidence.  
8 Circumstantial evidence is proof of one or more facts from  
9 which you find another fact or you could find another fact. If  
10 someone walked into the courtroom wearing a raincoat covered  
11 with drops of water and carrying a wet umbrella, that would be  
12 circumstantial evidence from which you could conclude that it  
13 was raining.

14 You should consider both kinds of evidence that was  
15 presented to you. The law makes no distinction in the weight  
16 to be given to direct or circumstantial evidence, and you are  
17 to decide how much weight to give to any evidence.

18 Number 5: Credibility of Witnesses.

19 In deciding what the facts are, you may have to decide  
20 what testimony you believe and what testimony you do not  
21 believe. You are the sole judges of the credibility of the  
22 witnesses. "Credibility" means whether a witness is worthy of  
23 belief. You maybe believe everything a witness says or only  
24 part of it or none of it. In deciding what to believe, you may  
25 consider a number of things, a number of factors, including the

1 following:

2                   The opportunity and ability of the witness to see or  
3 hear or know the things the witness testifies to;

4                   The quality of the witness's understanding and memory;

5                   The witness's manner while testifying;

6                   Whether the witness has an interest in the outcome of  
7 the case or any motive, bias or prejudice;

8                   Whether the witness is contradicted by anything the  
9 witness said or wrote before trial or by other evidence;

10                  How reasonable the witness's testimony is when  
11 considered in light of all of the other evidence that you  
12 believe; and

13                  Any other factors that bear on believability.

14                  The weight of the evidence to prove a fact does not  
15 necessarily depend on the number of witnesses who testify.

16                  What is more important is how believable the witnesses were and  
17 how much weight you think their testimony deserves.

18                  Number 6: Preponderance of the Evidence.

19                  This is a civil case. The plaintiff is the party who  
20 brought the lawsuit and the defendant is the party against whom  
21 the lawsuit was filed. Plaintiff has the burden of proving his  
22 case by what is called the preponderance of the evidence. That  
23 means plaintiff has to prove to you, in light of all the  
24 evidence, that what he claims is more likely so than not.

25                  To say it differently, if you were to put the evidence

1 favorable to plaintiff and the evidence favorable to defendant  
2 on both sides of the scales, plaintiff would have to make the  
3 scales tip somewhat on his side. If plaintiff fails to meet  
4 this burden, the verdict must be for the defendant.

5 If you find, after considering all the evidence, that  
6 a claim or fact is more likely so than not, then that claim or  
7 fact has been proved by a preponderance of the evidence.

8 In determining whether any fact has been proved by a  
9 preponderance of the evidence in this case, you may, unless I  
10 otherwise instructed, consider the testimony of all witnesses,  
11 regardless of who may have called them, and all exhibits  
12 received into evidence, regardless of who may produce them.

13 You may have heard the term "proof beyond a reasonable  
14 doubt." That's a stricter standard of proof that applies only  
15 to criminal cases. It does not apply to civil cases such as  
16 this and you should put it out of your mind.

17 I also will add, and I wanted to emphasize here, that  
18 Walmart only has the burden of proof by the same standard,  
19 preponderance of the evidence, as to their claim that Peter  
20 Pataki was comparatively negligent. So when we get to that  
21 portion, that's the only time that Walmart has the burden of  
22 proof.

23 Charge No. 7: Number of Witnesses and Fairness to a  
24 Corporation.

25 This case should be considered and decided by you as

1 an action between parties of equal standing in the community.  
2 A corporation is entitled to the same fair trial at your hands  
3 as is a private individual. Do not let prejudice, bias, or  
4 sympathy play any part in your deliberations. Corporations,  
5 like Walmart, and individuals like plaintiff, are equal before  
6 the law and must be treated as equals in a court of justice.

7 So you should disregard any argument that may have  
8 been made by either of the attorneys differently, such as  
9 references to the resources of a corporation versus an  
10 individual. They are treated equally in a court of law.

11 The weight of evidence to prove a fact does not  
12 necessarily depend on the number of witnesses who testify.  
13 What is more important is how believable the witnesses are and  
14 how much weight you think their testimony should receive.

15 Charge No. 8: Negligence and Ordinary Care.

16 Negligence may be defined as a failure to exercise, in  
17 the given circumstances, that degree of care for the safety of  
18 others which a person of ordinary prudence would exercise under  
19 similar circumstances. It may be the doing of an act which the  
20 ordinary prudent person would not have done or the failure to  
21 do that which the ordinary prudent person would have done under  
22 the circumstances then existing.

23 Negligence is the failure to use that degree of care,  
24 precaution, and vigilance which a reasonably prudent person  
25 would use under the same or similar circumstances. It includes

1 both affirmative acts which a reasonably prudent person would  
2 not have done and the omission of acts or precautions which a  
3 reasonably prudent person would have done or taken in the  
4 circumstances.

5 "A reasonably prudent person" does not mean the most  
6 cautious person nor one who is unusually bold but rather one of  
7 reasonable vigilance, caution and prudence. In order to  
8 establish negligence, it is not necessary that it be shown that  
9 the defendant had an evil heart or an intent to do harm.

10 To summarize, every person is required to exercise the  
11 foresight, prudence, and caution which a reasonably prudent  
12 person would exercise under the same or similar circumstances.

13 Negligence then is a departure from that standard of care.

14 Charge No. 9: Foreseeability.

15 In determining whether reasonable care has been  
16 exercised, you will consider whether the defendant ought to  
17 have foreseen, under the attending circumstances, that the  
18 natural and probable consequence of the defendant's act or  
19 omission to act would have been some injury. It is not  
20 necessary that the defendant anticipated the very occurrence  
21 which resulted from the defendant's wrongdoing. But it is  
22 sufficient that it was within the realm of foreseeability that  
23 some harm might occur thereby. The test is the probable and  
24 foreseeable consequences that may reasonably be anticipated  
25 from the performance or the failure to perform a particular

1 act. If an ordinary person under similar circumstances, by the  
2 use of ordinary care, could have foreseen the result that some  
3 injury or damage would probably result, and either would not  
4 have acted or if the person did act would have taken precaution  
5 to avoid the result, then the performance of the act or the  
6 failure to take such precautions would constitute negligence.

7 Specifically as to this case, Charge No. 10: Invitee.

8 An invitee is one who is invited or permitted to enter  
9 or remain on a premises for a purpose of the occupier. In this  
10 case, the invitee would be Mr. Pataki and the occupier of the  
11 premises would be Walmart, the Walmart store. The invitee, Mr.  
12 Pataki, enters by invitation expressed or implied. The  
13 occupier of the premises, Walmart, who by invitation, expressed  
14 or implied, induced persons to come upon the premises, is under  
15 a duty to exercise ordinary care to render the premises  
16 reasonably safe for the purposes embraced in the invitation.  
17 Thus, the occupier must exercise reasonable care for the  
18 invitee's safety. The occupier must take such steps as are  
19 reasonable and prudent to correct or give warning of hazardous  
20 conditions or defects actually known to the occupier or its  
21 employees and of hazardous conditions or defects which the  
22 occupier or its employees, by the exercise of reasonable care,  
23 could discover.

24 The basic duty of a proprietor of premises to which  
25 the public is invited for business purposes of the proprietor

1 is to exercise reasonable care to see that one who enters the  
2 premises upon that invitation has a reasonably safe place to do  
3 that which is within the scope of the invitation.

4 Charge 11: Duty.

5 The duty of the occupier of a premises to make the  
6 place reasonably safe for the proper use of an invitee requires  
7 the occupier to make reasonable inspection of the premises to  
8 discover hazardous conditions.

9 Number 12: Duty of a Retail Store.

10 One who owns or operates a business establishment,  
11 such as a supermarket, and invites members of the public to  
12 enter for business purposes, has a duty to exercise reasonable  
13 care for the safety of its customers. That duty includes the  
14 duty to use reasonable care to see to it that the premises are  
15 in reasonably safe condition for use of its customers.

16 If you find that the premises was not in a reasonably  
17 safe condition because of the failure to exercise such care,  
18 that is, subjected the customer to an unreasonable risk of  
19 harm, and defendant did not exercise reasonable care, then the  
20 defendant was negligent.

21 On the other hand, if you find that the condition of  
22 the premises was reasonably safe, that is, did not subject the  
23 customer to an unreasonable risk of harm, then the defendant  
24 was not negligent.

25 Number 13: Notice of Particular Danger as Condition

1 of Liability.

2 If you find that the premises was not in a reasonably  
3 safe condition, then in order to recover, the plaintiff must  
4 show either:

5 A, actual notice for a period of time before  
6 plaintiff's injury to permit the occupier in the exercise of  
7 reasonable care to have corrected it; or

8 B, constructive notice.

9 When the term "actual notice" is used, we mean that  
10 the occupier or its employees actually knew about the unsafe  
11 condition. When the term "constructive notice" is used, we  
12 mean that the particular condition existed for such a period of  
13 time that an occupier of the premises, in the exercise of  
14 reasonable care, should have discovered its existence. That is  
15 to say, constructive notice means that the person having a duty  
16 of care to another is deemed to have notice of unsafe  
17 conditions which exist for such a period of time that a person  
18 of reasonable diligence would have discovered them.

19 Number 14: Proximate Cause.

20 If you find Walmart was negligent, you must find that  
21 Walmart's negligence was a proximate cause of the accident  
22 before you can find that Walmart was responsible for  
23 plaintiff's claimed injuries and losses. It is the duty of the  
24 plaintiff to establish by the preponderance of the evidence  
25 that the negligence of Walmart was a proximate cause of the

1 accident and of the injuries and losses allegedly to have  
2 resulted from Walmart's negligence.

3 The basic question for you to resolve is whether  
4 plaintiff's injury is so connected with the negligent actions  
5 or inactions of Walmart that you decide it is reasonable, in  
6 accordance with the instructions that I will give you now, that  
7 Walmart should be held wholly or partially responsible for the  
8 injury and losses incurred by the plaintiff.

9 Number 15: More Proximate Cause.

10 By proximate cause, I refer to a cause that in a  
11 natural and continuous sequence produces the accident and the  
12 resulting injury and losses without which the resulting  
13 accident or injuries and losses would not have occurred. A  
14 person who is negligent is held responsible for any accident or  
15 injuries or losses that results in the ordinary course of  
16 events from its negligence. This means that you must find that  
17 the resulting accident or injuries or losses to plaintiff would  
18 not have occurred but for the negligent conduct of Walmart.

19 If you find that but for Walmart's negligence the  
20 accident or injury and losses would not have occurred, then you  
21 should find that Walmart was a proximate cause of plaintiff's  
22 injury and losses.

23 Charge No. 16: Comparative Fault.

24 Because Defendant Walmart has charged the Plaintiff  
25 Peter Pataki with negligence, Walmart has the burden to

1 prove -- and this is the only time Walmart has the burden --  
2 that the plaintiff was negligent and that such negligence was a  
3 proximate cause of the accident. Defendant also must prove his  
4 charge by a preponderance of the evidence or greater weight of  
5 the credible evidence.

6 If you find that the plaintiff and Walmart were both  
7 negligent and proximately caused the accident, then you must  
8 compare the negligent conduct of the plaintiff and Walmart in  
9 terms of percentages. You will attribute to each of them that  
10 percentage that you find describes or measures their negligent  
11 contribution in proximately causing the accident. The  
12 percentages must add up to a hundred. That might seem silly  
13 that I tell you but sometimes I get crazy verdicts back and it  
14 doesn't add up to a hundred. It has to add up to a hundred.  
15 You should not allocate any percentage to any individual or  
16 entity who you have found was not both negligent and a  
17 proximate cause of the accident.

18 So I will explain to you, though, the effect of the  
19 percentages if you choose to do this.

20 In order for the plaintiff to recover against any  
21 defendant, plaintiff's percentage of fault must be 50 percent  
22 or less. If the plaintiff's percentage is more than 50  
23 percent, the plaintiff will not recover damages at all and your  
24 deliberations are concluded and you should not make any  
25 determination as to damages. A plaintiff whose percentage of

1 fault is 50 percent or less will recover from any defendant  
2 whose fault you have found was a proximate cause of the  
3 accident.

4 Charge No. 17: Damages.

5 I will now instruct you on the law governing damages  
6 in the event that you decide liability in favor of the  
7 plaintiff.

8 The fact that I instruct you on damages should not be  
9 considered as suggesting any view of mine about which party is  
10 entitled to prevail in the case. Instructions on damages are  
11 given for your guidance in the event that you find the  
12 plaintiff is entitled to a verdict. I am required to provide  
13 instructions on damages in all cases in which the trial  
14 includes a claim for damages.

15 Charge No. 18: Medical Expenses.

16 A plaintiff who is awarded a verdict is entitled to  
17 payment for medical expenses which were reasonably required for  
18 the examination, treatment, and care of injuries proximately  
19 caused by the defendant's negligence or other wrongdoing.

20 Medical expenses are the costs of doctors' services,  
21 hospital services, medicines, medical supplies, and medical  
22 tests, any other charges for medical services.

23 In this case, the plaintiff is seeking the sum of  
24 \$38,500 in medical expenses. The parties have agreed that that  
25 amount -- I left out a word. The parties have agreed to that

1 amount of medical bills that plaintiff alleges he incurred as a  
2 result of this accident. And the total again is 38,500. You  
3 must, therefore, treat this fact as having been proved for  
4 purposes of the case. So, in other words, the parties have  
5 stipulated, as I explained to you earlier, as to the amount of  
6 the medical bills, solely as to the amount.

7 As a result, the upper limit of the award which you  
8 may make for medical expenses is 38,500, since you may not  
9 award more than the plaintiff is seeking or the parties have  
10 stipulated.

11 Charge 19: Disability, Impairment and Loss of  
12 Enjoyment of Life, Pain and Suffering.

13 If you find for plaintiff, he is entitled to recover  
14 fair and reasonable compensation for the full extent of harm  
15 and losses caused, no more and no less.

16 Fair and reasonable compensation means to make the  
17 plaintiff whole for any permanent or temporary injury and the  
18 consequences of that injury caused by the defendant's  
19 negligence.

20 The law on compensation recognizes that a plaintiff  
21 may recover for any disability or impairment that he suffers as  
22 a result of his injuries. Disability or impairment means  
23 worsening, weakening, or loss of faculties, health, or ability  
24 to participate in activities. The law also permits a plaintiff  
25 to recover for the loss of enjoyment of life, which means the

1 inability to pursue one's normal pleasure and enjoyment. You  
2 must determine how the injury has deprived plaintiff of his  
3 customary activities as a whole person. This measure of  
4 compensation is what a reasonable person would consider to be  
5 adequate and just under all the circumstances of the case to  
6 make the plaintiff whole for his injury and his consequent  
7 disability, impairment, and the loss of enjoyment of life. The  
8 law also recognizes as proper items for recovery the pain,  
9 physical and mental suffering, discomfort and distress that a  
10 person may endure as a natural consequence of an injury. Again,  
11 the item of recovery is what a reasonable person would consider  
12 to be adequate and just under all the circumstances to  
13 compensate the plaintiff.

14           Here are some factors you may want to consider or take  
15 into account when fixing the amount of the verdict for  
16 disability, impairment, loss of enjoyment of life, and pain and  
17 suffering.

18           You may consider the plaintiff's age, usual  
19 activities, occupation, family responsibilities, and similar  
20 relevant facts in evaluating the probable consequences of any  
21 injuries you find he has suffered. You are to consider the  
22 nature, character and seriousness of any injury, discomfort, or  
23 disfigurement. You must also consider their duration, as any  
24 verdict you make must cover the harms and losses suffered by  
25 the plaintiff since the accident to the present time and even

1 into the future, if you find plaintiff's injury and its  
2 consequences have continued to the present time or can  
3 reasonably be expected to continue into the future.

4 The law does not provide you with any table, schedule  
5 or formula by which a person's pain and suffering, disability,  
6 impairment, and loss of enjoyment of life may be measured in  
7 terms of money. That amount is left to your sound discretion.  
8 You are to use your sound discretion to attempt to make the  
9 plaintiff whole so far as money can do so based upon reason and  
10 sound judgment, without any passion, prejudice, bias, or  
11 sympathy. You each know from your common experience the nature  
12 of pain and suffering, disability, impairment, and loss of  
13 enjoyment of life, and you also know the nature and function of  
14 money. The task of equating the two so as to arrive at a fair  
15 and reasonable award of compensation requires a high order of  
16 human judgment. For this reason, the law can provide no better  
17 yardstick for your guidance other than your own impartial  
18 judgment and experience.

19 You are to exercise sound judgment as to what is fair,  
20 just, and reasonable under all the circumstances. You should,  
21 of course, consider the testimony of the plaintiff on the  
22 subject of discomfort. You should also scrutinize all the  
23 other evidence presented by both parties on this subject,  
24 including the testimony of doctors.

25 After considering the evidence, you shall award a lump

1 sum that will fairly and reasonably compensate the plaintiff  
2 for his pain and suffering, disability, impairment, and loss of  
3 enjoyment of life proximately caused by defendant's negligence.

4 Charge 20: Life Expectancy.

5 If you make an award for future pain and suffering,  
6 disability, and impairment, loss of enjoyment of life -- and  
7 there is no future claim for medical expenses, so when I go  
8 over the sheet, the verdict sheet, you will see there is no  
9 line for that -- you may consider the plaintiff's life  
10 expectancy. Plaintiff's life expectancy today is 33.2 years.  
11 That is an estimation of his probable length of life based on  
12 statistical data. Since it is a general estimate, you should  
13 use it with caution in any individual case. The plaintiff may  
14 live a longer or shorter period of time than the estimated  
15 figure. You should exercise your sound judgement in applying  
16 this life expectancy figure without treating it as a necessary  
17 and fixed rule.

18 Charge 21: Time Unit.

19 As I indicated right before closings, counsel is  
20 permitted to argue to the jury the appropriateness of applying  
21 a time-unit calculation in determining damages for pain and  
22 suffering, disability, impairment, and loss of enjoyment of  
23 life. Counsel are not permitted to mention specific amounts of  
24 money for the calculation of such damages. They are permitted,  
25 however, to argue that you may employ a time-unit calculation,

1 that is, to consider an amount of money in relation to the  
2 amount of time when determining such damages.

3 I charge you, the jury, that the argument of counsel  
4 with reference to the calculation of damages on a time-unit  
5 basis is argument only and is not to be considered by you as  
6 evidence. Counsel's statements are merely a suggestion to you  
7 as to how you might determine the damages for pain and  
8 suffering, disability, impairment, and loss of enjoyment of  
9 life. You are free to accept or reject the argument as you  
10 deem appropriate, and I remind you that you are to make a  
11 determination on the amount of damages based on the evidence  
12 presented and the instructions I have given to you.

13 Charge 22: Tax Consequences.

14 A personal injury damage award is not subject to  
15 federal or state income tax. Therefore, if you decide to award  
16 the plaintiff damages for his personal injury, you should not  
17 add nor subtract any tax from fixing the amount.

18 Charge 23: Expert Testimony.

19 You have heard testimony containing opinions from  
20 Dr. Vizzone, Brooks, and DeFalco. In weighing this opinion  
21 testimony, you may consider their qualifications, their reasons  
22 for their opinions, and the reliability of the information  
23 supporting those opinions, as well as the factors I've  
24 previously mentioned for weighing the testimony of any other  
25 witness. The opinion of these witnesses should receive

1 whatever weight and credit, if any, you think appropriate,  
2 given all of the other evidence in the case. In deciding  
3 whether to accept or rely on the opinion of these witnesses,  
4 you may consider any bias that these witnesses may have,  
5 including any bias that may arise from evidence that these  
6 witnesses have been or will be paid for reviewing the case and  
7 testifying or evidence that these witnesses regularly testify  
8 and make a large portion of their income from testifying in  
9 court.

10 Now we are going to talk about deliberations. This is  
11 a procedural logistic charge. Okay? 24.

12 When you retire to the jury room to deliberate, you  
13 will take with you the revised copy of these instructions and  
14 the exhibits which the Court has admitted into evidence, which  
15 will be on the iPads, and you should select one member of the  
16 jury to be your foreperson. So that's for you all to decide.  
17 That person will preside over deliberations and speak for you  
18 here in open court. So when we first started I told you two of  
19 you would be alternates. I always prefer, and in this case the  
20 parties have agreed, when you all sit for three days or four  
21 days or however long you are, to have all the jurors deliberate  
22 and the parties have agreed to do that. So all eight of you  
23 will deliberate in this case. Okay?

24 You have two main duties as jurors. The first one is  
25 to decide what the facts are from the evidence that you saw and

1 heard here in court. Deciding what the facts are is your job,  
2 not mine, and nothing that I have said or done during this  
3 trial was meant to influence your decision about the facts in  
4 any way.

5 Your second duty is to take the law that I give to  
6 you, apply it to the facts and decide if, under the appropriate  
7 burden of proof, the parties have established their claims. It  
8 is my job to instruct you about the law and you are bound by  
9 the oath that you took at the beginning of the trial to follow  
10 the instructions that I give to you even if you personally  
11 disagree with them. This includes the instructions I gave to  
12 you before and during the trial and these instructions now.  
13 All of the instructions are important and you should consider  
14 them together.

15 Perform these duties fairly. Do not let any sympathy,  
16 bias, or prejudice that you may feel toward one side or the  
17 other influence your decision in any way.

18 As jurors, you have a duty to consult with each other  
19 and deliberate with the intention of reaching a verdict. Each  
20 of you must decide the case for yourself but only after full  
21 and fair impartial consideration of all the evidence with your  
22 fellow jurors. Listen to each other carefully. In the course  
23 of your deliberations, you should feel free to re-examine your  
24 own views or to change your opinion based upon the evidence,  
25 but you should not give up your honest convictions about the

1 evidence just because of the opinions of some of your fellow  
2 jurors, nor should you change your mind just for purposes of  
3 obtaining enough votes for a verdict. And in this case your  
4 verdict has to be unanimous. So you all must agree on a  
5 verdict. You will see on the verdict form there is a line for  
6 a vote. It must say 8-0 for you to have a verdict.

7 When you start deliberating, do not talk to the jury  
8 officer, Ms. Minix, who is going to assist you logistically, to  
9 me or anyone else but each other about the case. During  
10 deliberations, you must not communicate with or provide any  
11 information to anyone by any means about the case. You may not  
12 use any electronic device or media, such as a cell phone, other  
13 than the iPad, other than that which we give you, or computer  
14 of any kind, the internet or any internet service or text or  
15 instant messaging like Twitter or any chat room, blog, website  
16 or social networking service, such as Facebook, My Space,  
17 LinkedIn, You Tube, et cetera, to communicate to anyone any  
18 information about the case or conduct any research and that  
19 rule applies until I take your verdict in open court.

20 You may not use these electronic means to investigate  
21 or communicate about the case because it is important, as I've  
22 told you over and over, that you decide the case based solely  
23 on the evidence presented in the courtroom. Information on the  
24 internet or through social media could be wrong, incomplete, or  
25 inaccurate, and information you might see on the internet or

1 social media has not been admitted into evidence and the  
2 parties have not had a chance to discuss it with you. You  
3 should not seek or obtain such information and it must not  
4 influence your decision in this case.

5 If you have any questions or messages for me, you must  
6 write them down on a piece of paper, have the foreperson sign  
7 them, and give them to the jury officer who will be outside the  
8 jury room. The officer will give the questions to me and I  
9 will respond as soon as I can. I may have to talk to the  
10 lawyers about what you have asked, so it may take some time to  
11 get back to you.

12 One more thing about messages. If you ask a question,  
13 never write down or tell anyone where you stand on your votes.  
14 For example, do not write down or tell anyone that a certain  
15 number is voting one way or another. Your votes should stay  
16 secret until you are finished.

17 Your verdict must represent the considered judgment of  
18 each juror and in order to return a verdict and reach a  
19 verdict, each juror must agree to the verdict. Your verdict  
20 must be unanimous.

21 A form of verdict sheet has been prepared for you.  
22 It's a series of questions for you to answer. You will take it  
23 into the jury room. And I will give you each a questionnaire  
24 so you can fill out or you can follow along but only one of the  
25 forms should be filled out, and that will be the one that the

1 foreperson has and signs. Okay? The others are for you to  
2 follow.

3 You will take the form to the jury room and when you  
4 have reached unanimous agreement as to the verdict, you will  
5 fill it in and the foreperson will date and sign one form. You  
6 will then return to the courtroom and your foreperson will give  
7 the verdict in open court. Unless I direct you otherwise, do  
8 not reveal your answers until I discharge you as jurors. After  
9 you reach a verdict, you are not required to talk to anyone  
10 about the case unless I order you to do so.

11 Once again, I want to remind you that nothing about my  
12 instructions and nothing about the verdict form is intended to  
13 suggest or convey in any way or manner what I think your  
14 verdict should be. It is your sole and exclusive duty to  
15 determine what the verdict should be.

16 So if you can look at the verdict sheet, I will go  
17 over it with you. And it's important that you answer the  
18 questions in order because they are in order for a particular  
19 way with directions as to what to do depending upon whether you  
20 answer yes or no.

21 Question No. 1: Do you find the Plaintiff Peter  
22 Pataki has proven by a preponderance of the evidence that  
23 Defendant Walmart was negligent on June 7, 2015?

24 You will check yes or no and the vote, which again  
25 should be eight to zero.

1           If your answer to Question No. 1 is no, then you don't  
2 answer any further questions. You sign the verdict sheet,  
3 return to the courtroom. But if your answer is yes, then you  
4 will proceed to Question 2.

5           Do you find that the Plaintiff Peter Pataki has proven  
6 by a preponderance of the evidence that Walmart's negligence  
7 was a proximate cause of harm to the plaintiff?

8           If your answer is no, you will answer no further  
9 questions; and if it's yes, you will proceed to Question 3.

10           Question 3: Do you find that the Defendant Walmart  
11 has proven by a preponderance of the evidence that Plaintiff  
12 Peter Pataki was negligent?

13           Same thing. If you answer no, you're told to skip to  
14 Question 6. If you answer yes, you will proceed to Question 4.  
15 So it's important that you follow the steps in the order that  
16 we have them.

17           Question 4: Do you find that Defendant Walmart has  
18 proven by a preponderance of the evidence that Plaintiff Peter  
19 Pataki's negligence was a proximate cause of the harm to the  
20 plaintiff?

21           If your answer is no, you will skip to Question 6; and  
22 if it's yes, you will proceed to Question 5.

23           Taking the combined negligence that was a proximate  
24 cause of any harm to the plaintiff as 100 percent, what  
25 percentage of that causal negligence was attributable to each

1 of the parties that you have found causally negligent?

2 And there is a line for Mr. Pataki and a line for  
3 Walmart and we've already put the 100 percent in there to make  
4 sure you remember and a vote line.

5 If you find the plaintiff's causal negligence to be  
6 greater than 50 percent, then do not answer any further  
7 questions. Sign the verdict sheet and return it.

8 If you find the causal negligence was 50 percent or  
9 lower, you go to Question 6, which is the final question.

10 State the amount of damages, if any, that would  
11 reasonably and fairly compensate Peter Pataki for any  
12 injuries that were proximately caused by the incident.

13 1, pain, suffering, disability, impairment, and loss  
14 of enjoyment of life.

15 And, separately, past medical expenses, which, as I  
16 said, the parties have stipulated in the event you determine to  
17 award them, what the amount is.

18 I just want to reference, we spent an inordinate  
19 amount of time trying to get the instructions and the verdict  
20 sheets right and we have had multiple versions. I want to make  
21 sure I just emphasize one of the lawyers referenced future  
22 medical expenses. There is no claim for future medical  
23 expenses. So the only medical expenses you can award are the  
24 past and only in the amount the parties stipulate, if you  
25 choose to make that award. Okay?

1 Again, you need to indicate your vote for damages.  
2 You all need to agree on a damages number. It has to be  
3 unanimous.

4 And then if you are finished at whatever question you  
5 finish, this last page needs to be signed by the jury  
6 foreperson. I ask you to put your name and then print your  
7 name. So sign it and print your name and date it. Okay?

8 So that is the procedure we will follow.

9 Counsel, any objections or exceptions to the charge or  
10 the verdict sheet?

11 MR. JEAN: None.

12 THE COURT: Mr. McDonnell?

13 MR. McDONNELL: None, Your Honor.

14 THE COURT: So at this time, ladies and gentlemen, I  
15 will finally let you have your lunch break. Again, I apologize  
16 but I like to give you the choice of plowing through or taking  
17 a break.

18 Ms. Minix will take you back to the jury room. She  
19 can assist you with heating anything up that you want to do.  
20 And then we will bring back the iPads and we will give you the  
21 final copies of these two. So for now, you can take -- they  
22 are in the jury room already. So leave what you have on your  
23 chair, okay, or on the ledge, and there is a clean copy of  
24 revised jury instructions and the clean verdict sheet in the  
25 jury room. Just take your verdict sheet. Okay? So take your

1 iPad and take your verdict sheet. And there are corrected  
2 instructions in there for you. Okay? If at any time you need  
3 anything, you can simply ask Ms. Minix and she will communicate  
4 with me, okay, but in writing.

5 THE COURTROOM DEPUTY: Please raise your right hand.

6 Do you solely swear to keep this jury together in some  
7 private and convenient place and not to permit any person to  
8 speak to or communicate with them nor to do so yourself unless  
9 by order of the Court or to ask whether they have agreed on a  
10 verdict and to return them into court when they have agreed or  
11 when ordered by the Court so help you God?

12 COURT SECURITY OFFICER SALVATORE PAPA: I do.

13 THE COURT: Thank you, ladies and gentlemen. We will  
14 wait to hear from you.

15 (The jury leaves the courtroom at 2:24 p.m. to  
16 deliberate.)

17 THE COURT: On the record.

18 Before we do motions or anything, we need to take a  
19 break because I have been going since 8:30 and I took no break  
20 between my order to show cause and starting. So I want to take  
21 at least a half-hour lunch. If by some reason the jury comes  
22 back in a half an hour, I doubt it, but if they do, we will  
23 talk about the motions after. You've reserved your rights to  
24 make the motions. Okay? I just think we all need a break.  
25 And my court reporter is entitled to a break too.

1 Just so the record's clear, Ms. Dominguez gave you the  
2 revised portions and you were all in agreement with that before  
3 they were given back to the jury?

4 MR. JEAN: Yes.

5 MR. McDONNELL: Yes, Your Honor.

6 THE COURT: I did not personally review them. I asked  
7 her to do that to be as efficient as possible and get it back  
8 to them.

9 I just realized that there is one thing I did not do,  
10 which is I did not talk to them about the MRIs and the doubles.  
11 I hesitate to bring them back out here. I can do that if you  
12 want to. My suggestion would be simply on my way out tell them  
13 I forgot to give them this charge and this is how the evidence  
14 is coming back, consistent with what we discussed, that they  
15 are duplicates but they are marked Ds and Ps.

16 Does anyone have any objection to me doing that as  
17 opposed to bringing them back in open court?

18 MR. JEAN: None. I just want to -- I don't know, the  
19 exhibits that I have are they identical? For example, the  
20 cervical screws, I don't know whether -- I called them by P  
21 exhibit so they are not all identical.

22 THE COURT: I am going to say some of them may be  
23 duplicative but it's because of the way the parties  
24 individually marked them at the time of the depositions. I  
25 know they are not all duplicative. So that is what I intended

1 to tell them. Is that okay?

2 MR. JEAN: That's fine, so long as they look at  
3 everything.

4 THE COURT: Mr. McDonnell?

5 MR. McDONNELL: No objection.

6 THE COURT: Okay. So I will tell them that rather  
7 than traipsing them back out here. We will recess and if I  
8 hear from them with a verdict or a question, I will hear from  
9 you. Please make sure if you are going to go further than the  
10 hallway you give Ms. Minix your cell phone number so that she  
11 can reach you so if we have a verdict, I can come out and do it  
12 timely. Okay?

13 I will come back at 3:00, if nothing else happens  
14 before then, and we will address your motions. Okay?

15 THE COURTROOM DEPUTY: All rise.

16 (Brief recess taken from 2:27 p.m. until 3:22 p.m.)

17 THE COURT: So we are back on the record.

18 The jury is deliberating.

19 I did give them the instruction about the MRIs that we  
20 talked about just before they started deliberating. And I  
21 wanted to take the time, while they are doing that, to hear you  
22 on your motions.

23 So, Mr. McDonnell, I understand and I reserved your  
24 right to make a motion.

25 MR. McDONNELL: Yes, Your Honor. We'd make a motion

1 under Rule 50 of the Federal Rules of Civil Procedure for  
2 judgment as a matter of law.

3                   Based upon the evidence that's been elicited -- I'm  
4 sorry, Camille, I'll slow down.

5                   Based upon the evidence that was introduced at trial,  
6 no reasonable juror could determine that there was an  
7 unreasonable risk of harm since the plastic or item which  
8 Mr. Pataki allegedly slipped upon was not described in any way,  
9 fashion, or given any kind of properties that would suggest  
10 that it was hazardous or even that he fell on it. There was no  
11 evidence that that condition, whatever it was, was on property  
12 long enough for Walmart to either have actual or constructive  
13 notice. There was no evidence of actual notice outright and  
14 there is no evidence as to how long whatever condition it was,  
15 if any, that caused Mr. Pataki to fall was on the floor.

16                   THE COURT: We know it was at least four minutes,  
17 right?

18                   MR. McDONNELL: That's the plaintiff's allegations but  
19 it's --

20                   THE COURT: Well, I mean, it's on the video so we at  
21 least have four minutes of video that show something allegedly  
22 on the floor, right? So if a jury was to believe the  
23 plaintiff's testimony that there was something on the floor,  
24 which Ms. Gardner appeared to corroborate, at worst for you or  
25 at best for plaintiff, it was four minutes. Isn't that for a

1 jury to decide whether or not that's a reasonable amount of  
2 time? You think, as a matter of law, I can decide that?

3 MR. McDONNELL: Yes, I don't think four minutes,  
4 Your Honor -- even assuming it was four minutes, and, again, we  
5 don't really know what it was or even if that glare spot on the  
6 floor did cause the fall because it didn't move after he fell  
7 through it, even assuming arguendo, though, that that was the  
8 spot, I don't believe four minutes is sufficient to hold a  
9 retailer as to have constructive notice of a condition.

10 THE COURT: What about actual notice that there is a  
11 video that undoubtedly shows at least one or I think two  
12 employees pushing a very large cart in the very direction of  
13 where the plastic was on the floor? I think they could argue  
14 that there is sufficient evidence from which a jury could find  
15 actual notice because those employees -- it was looking them in  
16 the face. I am not saying I find it credible, but I am saying  
17 that argument has certainly been made. It seems to me to be a  
18 jury question, at least at this point, because I do think,  
19 although I think it's not substantial, there is some evidence  
20 in the record on the video, and it's not just plaintiff's  
21 saying it, that there were employees in the area within minutes  
22 of him falling, right?

23 MR. McDONNELL: I understand, Your Honor.

24 Just moving on.

25 THE COURT: Okay.

1                   MR. McDONNELL: We're going to move for a matter of  
2 law on the issue of proximate cause of the injury. There is no  
3 causation. Dr. Vizzone said that his basis of causation was he  
4 didn't have these problems before and now he claims he has  
5 these problems.

6                   So other than the plaintiff, there is no basis for any  
7 kind of finding to a reasonable degree of medical certainty  
8 that the findings that were discussed or that the surgeries are  
9 related to the fall.

10                  I can -- I'm sorry. Your Honor, I think we made it  
11 previously in the context of a jury instruction. We don't  
12 believe that Dr. Vizzone provided any evidence from which a  
13 reasonable juror could decide anything with respect to  
14 prognosis or future pain and suffering. There was no testimony  
15 he was disabled, that he was impaired.

16                  So, Your Honor, we would say that, as a matter of law,  
17 Walmart is not responsible for any sort of kind of claim for  
18 any sort of future disability, impairment, loss of enjoyment of  
19 life. There was no evidence as to his current medical status  
20 or prognosis.

21                  Your Honor, further we would argue that he was  
22 comparatively negligent, as a matter of law, which is assuming  
23 arguendo that this object was visible to those gentlemen from  
24 Walmart pushing it from further away, they turned up the aisle  
25 closer to Mr. Pataki at the time of the accident and that

1 Mr. Pataki failed to exercise due care for his safety and was  
2 comparatively negligent, as a matter of law.

3 I will just ask my partner, is that it?

4 Your Honor, that would be our motion.

5 THE COURT: Mr. Jean, I will hear you.

6 MR. JEAN: Your Honor, if I may be heard. The  
7 evidence supports the issue of proximate cause. Dr. Vizzone,  
8 who is the treating doctor and the only doctor provided by the  
9 plaintiff during this trial, established, and I did this and I  
10 recall raising my fingers one, two, three to illustrate the  
11 point that there were many things that he used in formulating  
12 his opinion which he said within a reasonable degree of  
13 certainty in the field of orthopedic surgery. He concluded  
14 that, one, it was causally related; and, two, it was a  
15 permanent injury.

16 The objective -- the credible objective evidence that  
17 he used was, number one, he had an X-ray; number two, he had at  
18 least 50 exams where he conducted objective tests on the  
19 plaintiff; number 3, there were MRI films that he used. In  
20 addition, he saw the herniated disc up close when he did the  
21 actual surgery.

22 So based upon those credible objective evidence that  
23 supports the issue of proximate cause, the motion by the  
24 defendant should be denied.

25 THE COURT: So I am going to reserve on the issue. I

1 will say that I do not believe, as a matter of law, that I  
2 could -- partially I am going to reserve. I do not believe, as  
3 a matter of law, that I can decide whether or not a jury could  
4 find an unreasonable risk. I think no one disputes that  
5 something is on the floor and there's been disputed testimony,  
6 at least one person described it as a Ziploc bag, plaintiff  
7 described it as some kind of plastic. That's a jury question  
8 to me. It's not as if we have no one knows what he slipped on,  
9 he just fell.

10 With respect to whether it was actual or constructive  
11 notice, the video undisputedly shows it on the floor for a  
12 period of time. A jury could decide from that alone that it  
13 was unreasonable.

14 (Brief interruption.)

15 THE COURT: A jury could decide from that alone that  
16 it was unreasonable. And there is also evidence on the video  
17 of employees in or around the area, and I think a jury could  
18 make the inference or the determination within reason that the  
19 employees could have or should have seen it. So for that  
20 reason certainly on that prong of it.

21 As to proximate cause, I think the combination of  
22 Dr. Vizzone saying it was permanent, coupled with the plaintiff  
23 giving testimony as to what he can no longer do, provides some  
24 basis for the jury to make determinations about future issues,  
25 although, admittedly, Dr. Vizzone didn't give an opinion on

1 prognosis or future medical care. But they are not giving an  
2 award under any circumstances for future medical bills. So I  
3 am not as concerned about that.

4 So for that reason, I am going to deny it, as I said,  
5 and reserve as to the other argument that you made. Okay?

6 So do you want to see what the CSO wants? Is he  
7 asking for me or is he saying he has a note?

8 THE COURTROOM DEPUTY: We have a verdict.

9 THE COURT: Bring them in.

10 THE COURTROOM DEPUTY: All rise.

11 (The jury enters the courtroom at 3:30 p.m.)

12 THE COURT: You can all be seated.

13 I have been advised that you have reached a verdict,  
14 is that correct?

15 Who is the jury foreperson?

16 Ms. Minix, can you get the form from the juror,  
17 please? It's Juror No. 7.

18 Can you please hand it back to the foreperson?

19 Sir, I am going to ask you to stand and I will read  
20 the questions and if you could tell me the jury's verdict.

21 Question No. 1: Do you find that the Plaintiff Peter  
22 Pataki has proven by a preponderance of the evidence that  
23 Defendant Walmart was negligent on June 7, 2015?

24 THE FOREPERSON: No, Your Honor.

25 THE COURT: And what was your vote?

1 THE FOREPERSON: Eight to zero.

2 THE COURT: And you did not consider any further  
3 questions, correct?

4 THE FOREPERSON: No.

5 THE COURT: Okay. You can be seated, sir.

6 One of the things I do is I poll the jury. So I am  
7 going to ask each of you, when I call your juror number, to  
8 just simply affirm that that is your verdict and that was your  
9 vote.

10 Juror No. 1?

11 JUROR NO. 1: Yes.

12 THE COURT: Juror No. 2?

13 JUROR NO. 2: Yes.

14 THE COURT: Juror No. 3?

15 JUROR NO. 3: Yeah.

16 THE COURT: Juror No. 4?

17 JUROR NO. 4: Yes.

18 THE COURT: Juror No. 5?

19 JUROR NO. 5: Yes.

20 THE COURT: Juror No. 6?

21 JUROR NO. 6: Yes.

22 THE COURT: Juror No. 7?

23 JUROR NO. 7: Yes.

24 THE COURT: Juror No. 8?

25 JUROR NO. 8: Yes, ma'am.

1 THE COURT: Anything further from counsel?

2 MR. JEAN: Nothing.

3 MR. McDONNELL: No, Your Honor.

4 THE COURT: Ladies and gentlemen, I want to thank you  
5 immensely for your time and attention for these days. I am  
6 going to discharge you from jury service. I will come back to  
7 the jury room just to have a few words with you before I let  
8 you go completely. So just give me a few moments and I will be  
9 right back in.

10 Thank you very much on behalf of the court and all the  
11 parties for your time and attention.

12 THE COURTROOM DEPUTY: All rise.

13 (The jury is excused at 3:33 p.m.)

14 THE COURT: Okay. You can all be seated.

15 Counsel, anything before we adjourn? Mr. Jean?

16 MR. JEAN: Nothing.

17 THE COURT: Mr. McDonnell?

18 MR. McDONNELL: No, Your Honor.

19 THE COURT: Okay. Mr. Pataki, I know this was not the  
20 result that you wanted but you had a full trial and a very  
21 zealous advocate on your behalf and eight members of the  
22 community decided in favor of Walmart. I wish you the best,  
23 sir.

24 We are adjourned.

25 We can go off the record.

## 1 (Off-the-record discussion.)

2 THE COURTROOM DEPUTY: All rise.

3 (Proceedings concluded at 3:34 p.m.)

4 | Page

**5 FEDERAL OFFICIAL COURT REPORTER'S CERTIFICATE**

7

8 I certify that the foregoing is a correct transcript  
9 from the record of proceedings in the above-entitled matter.

10

**11** /S/ Camille Pedano, CCR, RMR, CRR, CRC, RPR January 30, 2025  
United States Official Court Reporter Date

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